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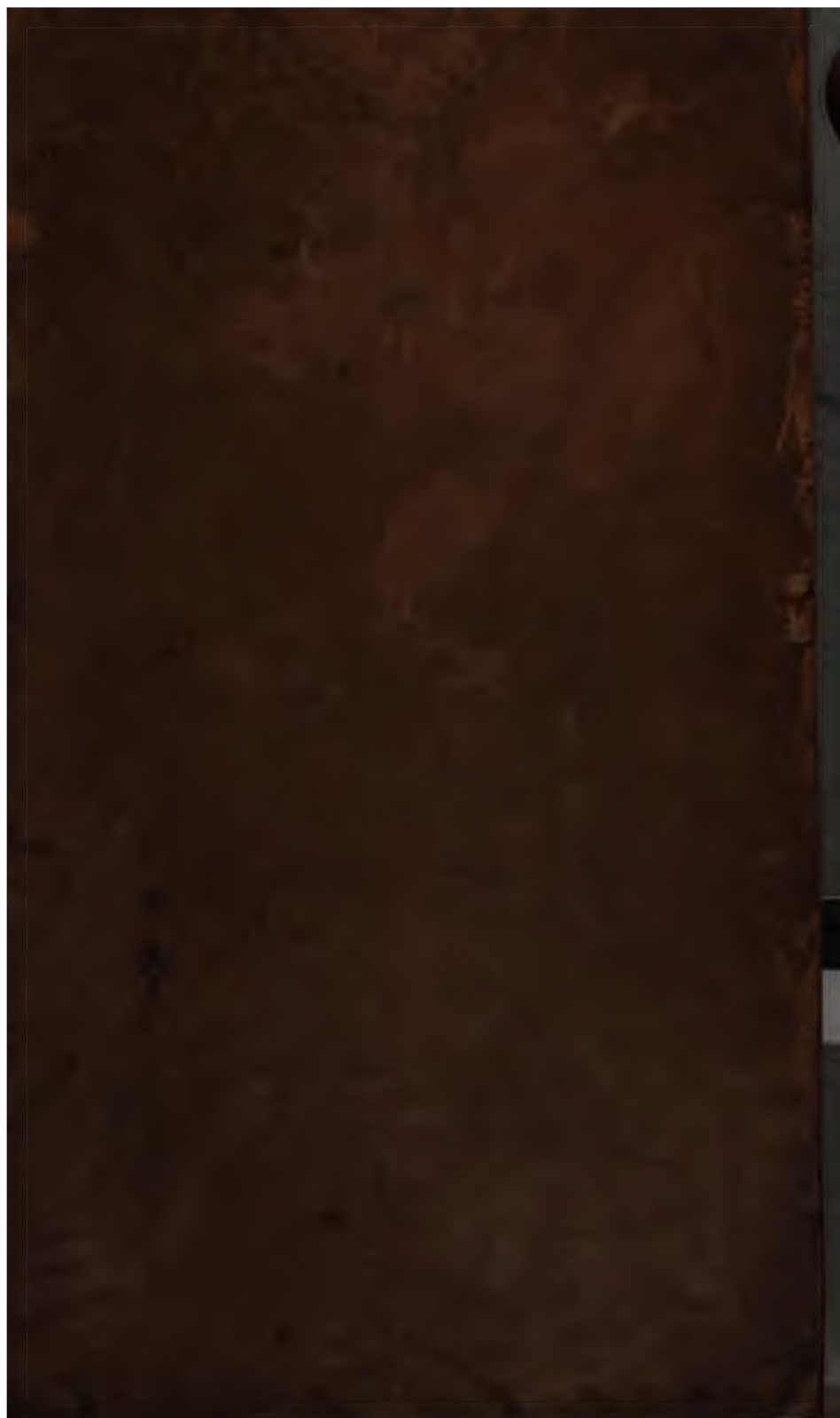
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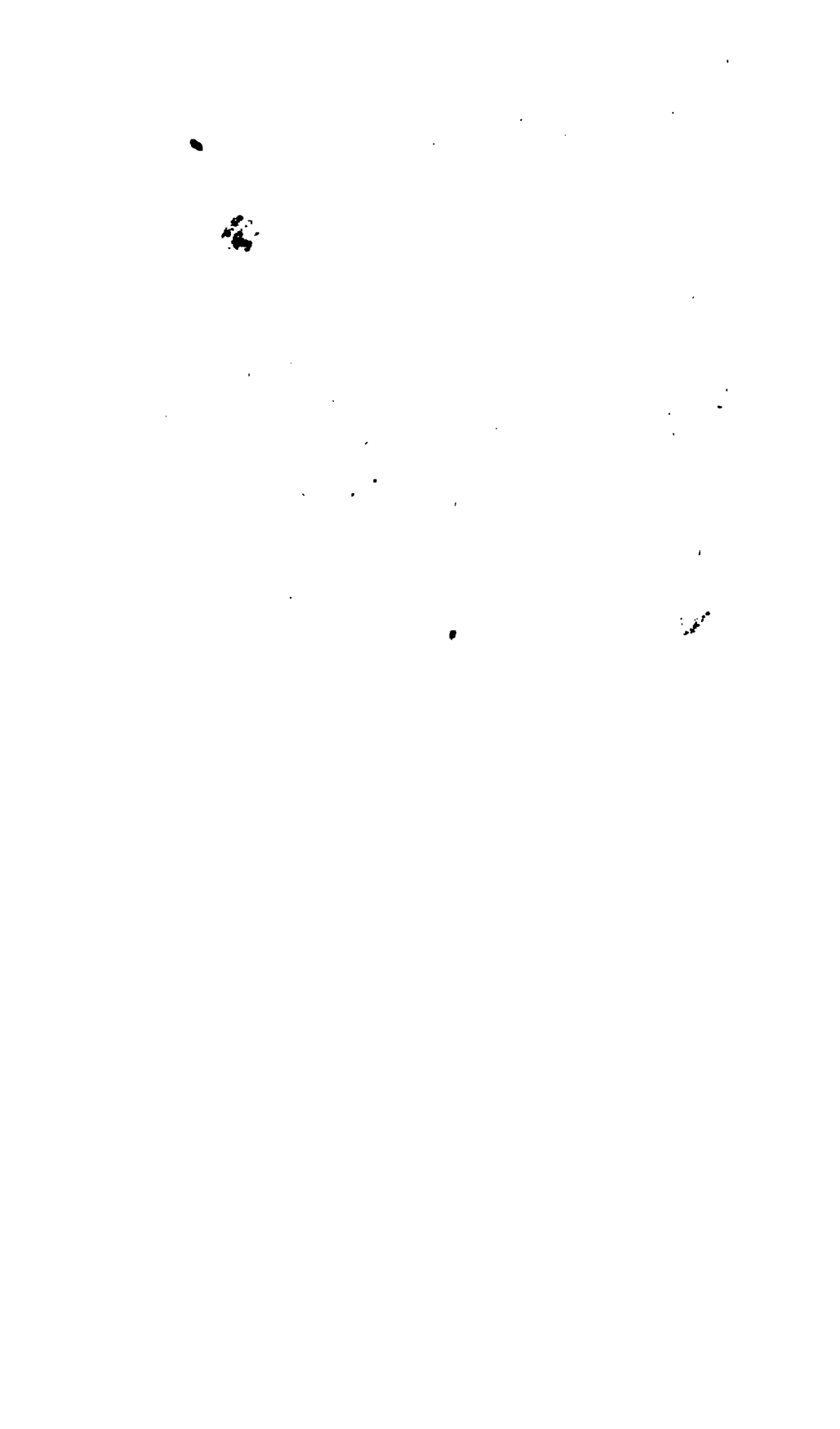
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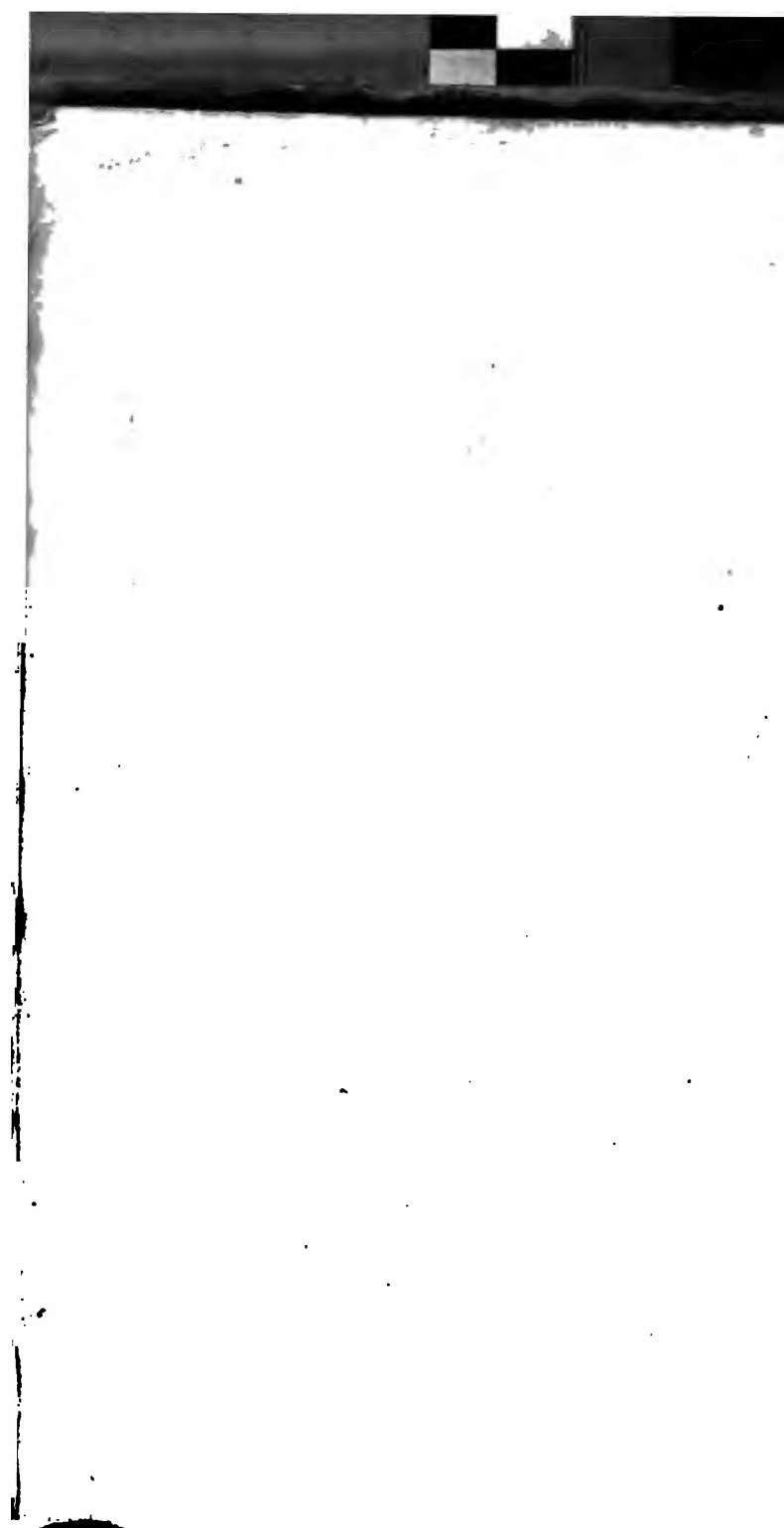
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THE
LAWYERS
AND
MAGISTRATE
MAGAZINE

IN WHICH IS INCLUDED

An Account of every important Proceeding in the

COURTS AT WESTMINSTER,

DURING THE PRESENT YEAR.

WITH THE DECISIONS OF THE

JUDGES,

IN THEIR OWN WORDS.

VOL. II.

FOR THE YEAR MDCCXCI.



—DUBLIN:—

PRINTED FOR W. JONES, 86, DAME-STREET,
AND W. WATTS, CHRIST CHURCH-LANE.

1792.



PLAN OF THE WORK.

TO give an immediate, full, and accurate account of every important Decision in the several Courts at Westminster is the primary object of this Publication; the utility of which to every one who practises the Law, and still more to those who administer it, is too obvious to be enlarged upon. To the Student also it will be found a source of necessary knowledge, and to the Private Gentleman a fund of useful information.

In the course of the Work, every important object depending before the Legislature will be constantly noticed; and a particular account will be given of all Trials, Criminal or Civil, which involve any important Law point, or materially engage the public attention.

A Publication of this kind seems peculiarly proper at this time, when the Newspapers are daily giving undigested and erroneous accounts of Law Cases, which cannot fail to perplex and mislead the Practitioner and the Student; and to betray the people, as circumstances may arise in their own concerns, into mistaken hopes and fears from the justice of the country.

It remains only to add, that this Work will be continued Monthly, and no pains or diligence shall be wanting to render it acceptable to the Profession, instructive to the Student, and useful to that most honourable and beneficial of all public characters, the COUNTRY MAGISTRATE.

[illegible]

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THE
LAWYER'S
AND
MAGISTRATE'S MAGAZINE,
For SEPTEMBER, 1790.

OLD BAILEY, SEPTEMBER 17, 1790.

THE TRIAL OF GEORGE BARRINGTON,
for stealing, on the first of September, a Gold
Watch, with Chain and Seals, the Property of
HENRY HARE TOWNSEND, Esq.

WHEN the prisoner was arraigned, he addressed the Court, and complained that his money was taken from him at the time he was apprehended, though his accuser did not pretend to have lost any money.

Henry Hare Townsend, Esq.—My Lord, I am the prosecutor in this case. When the prisoner was apprehended, the money was sealed up which was taken from him, together with a snuff-box, and a metal watch, which were also found on him. This was done under the idea, that these articles might belong to somebody or other, who might afterwards claim them.

The Constable produced the articles above-mentioned, with a silk purse, and twenty guineas, which were taken from the prisoner at the time he was taken into custody.

Mr. Recorder.—Mr. Barrington, I shall order your money to be returned to you; and the twenty guineas were accordingly handed over to the prisoner, who, after counting them, said, My Lord, I thank you.

B

Clerk

way conducted him the rest of the way to the booth. I was walking by; I know no more of the business only I saw him safe in the booth, and as he was going over the booth, there was a little man with a stick struck him over the head once or twice; I was rather in a disagreeable situation; I did not like to see the man beat when both his hands were confined, and I desired him to desist, and he did not: and I was obliged to tell him if he did not I would knock him down, and I thought I should have all parties against me.

Cross-examined by Mr. Garrow, Prisoner's Council.

Q. You was dressed pretty much as you are now?

A. Pretty much; I had nearly the same cloaths on.

Q. Does that include that your coat was in the state it is now, buttoned?

A. Exactly.

Q. The sensation that the man in the white coat occasioned to you at first was that of a man pushing rudely against the proprietor of a horse that had won?

A. Yet it was.

Q. No other sensation had been occasioned in your mind till Mr. Blades spoke to you?

A. None whatever.

Q. From the period of weighing your jockey, till the time Barrington was secured by you, how much time had elapsed?

A. Very near half an hour.

Q. I apprehend that the moment of the conclusion of the heat is a very anxious one?

A. Yes, Sir, it is.

Q. And those who have bets on the preceding heat, or have bets to make, naturally wish to see the horse on coming in?

A. Certainly.

Q. Those who have large bets, wish to see whether the jockey has any make-weight, and crowd to the winning post?

A. I suppose they do.

Q. The first sensation you felt was, that it was a natural pressure?

A. I did not think it was natural; I should not have run against a gentleman so.

Q. I do not know whether you expect the manners of a drawing room on a race ground?

A. There is a kind of etiquette that is observed.

Q. There

Q. There are decorums that are better observed certainly; but an unpolished man and an ignorant one, might run against the proprietor of a horse. You did not know the person of Mr. Barrington before?

A. No.

Q. Your having lost your watch, was not a profound secret?

A. Four or five asked me if I had.

Court. What might be the depth of that waistcoat pocket?

A. About three inches; a welted pocket; the watch and chain were covered.

Buxton Kendrick sworn.

When the prisoner was first brought up to the booth in custody, I was very near him: I heard something rattle from behind him; I looked that way immediately, and I saw the watch dropping, falling on the ground in about half a minute after he came into the booth; I immediately stooped to pick it up, it fell down on the ground directly by the prisoner. I was standing to the right of him with my face towards him, I was next to him, and the watch dropped almost between his legs; I could not see either of his hands, they were both behind, they were set at liberty. I do not recollect who brought him into the booth; there was a great number of people laid hold of him, and somebody pulled him and pushed him. There were some ladies in the other booth on his left hand; there was a partition, breast high, between the two booths; there was nobody between him and the partition, nor nobody behind him but the boards and a carpet nailed over them, he was at the end of the booth almost in the corner; Mr. Townsend's coachman was next to me, we were the nearest to him, there was nobody else near for the watch to have fallen from them; the booth is opposite the ending post where they come in.

Court to Mr. Townsend.—Had you been in that booth?

A. Yes, that was the booth that I came out of.

Q. Had you been in that corner?

A. No; I do not think I had, indeed I am pretty sure I had not been in that corner, because I kept as near as possible, and stood up on a form all the time that my horse was running; there was a row of ladies close to the edge of the booth, and I stood up behind them.

Court to Mr. Kendrick.—Was there any form behind the prisoner?

A. No; no form at all;—a circumstance I forgot, the prisoner attempted to kick the watch behind; almost at the in-

instant I went to pick it up, he attempted just to kick again with his heel.

Obt to Mr. Townsend.—Was the watch you saw gentleman's possession that day, the watch you lost?

A. It certainly was.

Mr. Garrow to Mr. Kendrick.—Did you take such of the watch in the booth as to know it again?

A. I took notice of it by the hands; there were hands.

Q. That in a race course is of great importance?

A. Yes, and I observed a gold link chain, and seal.

Q. The next booth was a common six penny boot

A. Yes, and separated by a partition elbow high.

Q. Not breast high?

A. No, not so high.

Q. How long had the rumour of Mr. Townsend's lost his watch, reached you before the prisoner was cured?

A. It was I believe half an hour.

Q. And there was another rumour I believe nearly with it, namely, that Barrington was on the course?

A. Yes, there was; but I did not hear it before he had taken Mr. Townsend's watch. I saw Mr. Eton searched at the Angel, he had twenty-two and guineas about him.

John Walduck sworn.

I am coachman to Mr. Townsend; I knew not the matter till I helped to take the prisoner to the booth; I had one hand on his collar, and the other hold of his hand, which was open. He could have nothing in his right hand. I was left in care of him. I put him at the back of the booth, and there was a carpet nailed back of that. Mr. Kendrick was on one side of him on the other; the ladies were looking over the ad booth on the side I was, which was about three foot half, or four foot high; I saw the watch drop between Barrington and the carpet, it apparently fell on the floor of him behind him, I saw it as it jingled down, before it reached the ground. I did not notice any motion the prisoner made at the time, but his arms hung down on one side of him, I did not particularly see his hands. Mr. Kendrick picked up the watch; I know it to be my master's, fetched it from London a few days before; I do not know who Mr. Kendrick gave it to.

Mr. Garrow.—Upon your oath did not you say before the magistrate, when the watch was shewn you, that you could neither tell whether it was your master's watch or the watch that was taken off the ground?

A. I am positive I did not.

Q. If Mr. Barrington had put his hands in his pocket you would have prevented him?

A. I do not know I was so curious as that.

Q. Upon your oath, did he put his hand in either pocket, or attempt any such thing?

A. Not to my knowledge.

Q. Do not you know he did not?

A. No, I do not.

Thomas Kempton sworn.

On Wednesday the 1st of September, on Enfield race-ground I met Mr. Townsend; I asked him whether he had not lost his watch? and told him Barrington was on the course, near the distance post. I went down there, and Mr. Townsend had got hold of Barrington: then I went to see the decision of the plate, and when I returned I saw the watch in Mr Kendrick's hand.

Mr. Blades sworn.

On the 1st of September I was at Enfield-races, close to the stand: I then saw the prisoner, and I told a friend of mine it was Barrington. No, says he, it cannot be Barrington along with Mr. Townsend, for he was as close to Mr. Townsend as he possibly could be. I then went to Mr. Townsend to be perfectly satisfied, and asked him if he recollected a tall thin gent'eman in light cloaths? He said, I do remember seeing such a person, but he was no acquaintance of mine. Mr. Townsend then asked me why I asked that question? Why, says I, I have an opinion it was Barrington; he immediately felt in his pocket; says he, I have lost my watch, and he begged me to walk up and down the course to shew him the person, and in 20 minutes time I saw the prisoner; I said, I see the person now; says Mr. Townsend that is him, is it not? He went and took hold of him and says, "Sir, your name is Barrington? D—n me, Sir," says he, "you have robbed me of my watch," and I assisted and took fast hold of him. Going along, he did not try to get away himself, other people seemed to be trying.

Court. He could not help what other people did.

Mr. Blades.

Mr. Blades. I saw him in the booth, I did not see the watch.

Mr. Garrow.—Did not the prisoner say, “You are right Sir, as to my name, but I have not your watch?”

A. I heard him say nothing about his name.

George Law, the Constable, produced the watch which he received of Mr. Townsend, which was depoted to by Mr. Townsend to be his watch which he lost on the course that day; it was also depoted to by the coachman, as the watch that was picked up in the booth.

Mary Dandy sworn.

I was in the next booth to that in which the prisoner was brought in, I was but a very little way off him, there was nobody between him and me, nothing but the partition; I was next the partition; the prisoner was sideways to me when he dropped the watch on his side; he dropped the watch from his hand; I told him of it at the time; I cannot recollect which hand; his hand was by the side of him at the time I saw it drop from him, and I mentioned it to him at the time.

Cross-examined by Mr. Garrow.

Q. Was it the side nearest to you, or farthest from you?

A. Nearest to me.

Q. There were many persons in the same booth with you?

A. Yes.

Q. You paid for your admission?

A. Yes.

Q. Did you go before the magistrate?

A. No.

Q. So this is the first time you have been examined on the subject?

A. Yes.

Q. How was you found out?

A. I do not know; a gentleman that went with me to the races told Mr. Townsend.

Q. Pray where do you live?

A. At Ponder's-End.

Q. A married or single lady?

A. Single.

Q. Do you know where the prisoner got the watch from?

A. I cannot say.

Q. You did not see him take it from under his hat?

A. No.

Q. If it had dropped behind, and he had attempted to kick it you must have seen that?

A. I did not pay any attention to that.

Q. If he had got before and attempted to have kicked with his heel backward, you could have seen him?

A. I looked in his face, and I was pulled away; somebody else crowded to the partition.

Q. Did this gentleman live in London that was with you?

A. I do not know where he lives; you do not mean the gentleman in the carriage?

Q. Yes, I do.

A. Oh, I forget his name; Mr. Townsend I believe knows him; he was not in the booth with me.

Q. Are you an acquaintance of Mr. Townsend's?

A. No.

Q. Where did you find that gentleman?

A. He is an acquaintance of my father's.

Q. Who was entrusted by your father to carry his daughter to the races in a one-horse chaise?

A. Yes.

Q. How long has he been acquainted with your father?

A. I do not know; he is my step-father; does any body here know his name?

Q. Do not ask any body else.

A. I never was in his company but that one time.

Q. Did he come from London?

A. I do not know where he comes from; I believe he comes out of the country; he called at my father's, and as he was going down, my father asked him to carry me to the races.

Q. Did he bring you back again?

A. No; I came home in another gentleman's chaise-cart.

Q. What was that gentleman's name?

A. I do not know him.

Q. What part of Ponders'-End do you live in?

A. I live just by the two-Brewers.

Q. Do you usually take these excursions.

A. I was with more company, and it rained very hard.

Q. What company was you in?

A. I was with my sisters.

Q. Try and recollect the name of one of those gentlemen.

A. I do not know either of their names; I never saw the gentleman that called in the morning before or since.

Q. Then

Q. Then he did not come to you with a message from Mr. Townsend?

A. No, Sir; Mr. Townsend came to me himself.

Q. Is this a young gentleman?

A. No, he is an elderly gentleman; he is a farmer in the country.

Q. Should you know his name if you was to hear it?

A. I do not know.

Q. Was it Stonester?

A. I do not think it was; I do not know.

Q. Was it Bishop?

A. I cannot swear to his name.

Mr. Townsend.—I think the young woman's character is in some measure at stake; therefore I wish to clear up this matter: that young woman's father-in-law is a farmer, who has lived a long time in my neighbourhood, and is much respected; the gentleman to whose care she was intrusted, is an elderly man, whose name is Chase; he was going to the races in his one-horse chaise; he told me of this circumstance; and my coachman said that when Barrington said, "Did any body see me drop the watch?" a young woman in the next booth said, "Yes; I did!" I related this to Mr. Smith, the Attorney to the India Company, and he said this was a very material witness.

Mr. Garrow.—I submit Mr. Townsend cannot tell the conversations.

Court.—It does not go further than restoring the credit of the witness; therefore it is as fit as that all manner of circumstances that do seem to bear against the credit of a witness should be related.

Mr. Townsend.—Mr. Smith said, That will be a very material witness; I never could learn any thing about her, till on Saturday last I went by accident to Mr. Chase, who had been a long time a servant to my father, and owed a small rent of 5 guineas or so. He asked me about losing my watch, and he said "A young woman, I carried to the races in my chaise, saw him drop the watch."

Court.—The circumstances were certainly such as made it the duty of the Council to go into the examination; but it was also equally fit to hear every thing that could be said to establish the credit of the witness, who certainly seemed to have gone to the races in a way that did not appear proper; there is no way of finding out the truth but by examining into all the circumstances.

Court to Prisoner.—Prisoner, you have heard the whole of the evidence that is against you; you are to state the matter
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of fact to the Jury yourself, with the observations on the evidence on the part of the prosecution: and by way of introduction to your own evidence, if you have any yourself; your counsel are only permitted to cross examine the witnesses on the part of the prosecution. This is the time for you to make your defence.

Prisoner's Defence.

May it please your Lordship, and you Gentlemen of the Jury, to favour me with your attention for a little time. The situation of every person who has the misfortune to stand here is extremely distressing and awkward; mine is so in a peculiar degree: if I am totally silent, it may be considered perhaps as a proof of guilt, and if I presume to offer those arguments which present themselves to my mind, in my defence, they may not perhaps be favoured with that attention which they might deserve; yet I by no means distrust the candour and benevolence of the Jury, and therefore I will beg leave to proceed to state the circumstances of the case as they occur to me, not doubting but they will meet with some degree of credit, notwithstanding the unhappy situation I am in. Gentlemen, I was on the Race-ground at Enfield, observing the race on the day that the Indictment mentions, where I found myself surrounded by Mr. Townsend and numbers of others. Mr. Townsend said, "Your name is Barrington, and you have taken my watch!" I told him he was right as to my name, but he accused me unjustly: however I would go any where with him; I was removed from thence to a stand, from whence the races were viewed; it consisted of two Booths, and they were separated from each other with only a railing elbow high; and it is a great misfortune to me, Gentlemen of the Jury, that you were not able to observe the situation of those Booths; for if you had, you would have found it nearly impossible that some circumstances which have come from the witnesses could be true. I was close to the railing that separated the two Booths, and some person said, "Here is a watch!" This watch Mr. Townsend claimed, and said it was his. I was removed from thence to the Angel at Edmonton, where the examination took place; and I am very sorry to be under the necessity of observing, that a very material difference has taken place in the depositions delivered that day before the magistrate in various respects. A witness, the coachman, positively declared that he did not see this watch in my hand, that he did not see me take it from my pocket, that

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he did not see it drop from the person; but that he saw it on the ground, and he might have gone so far as to say he saw it fall; I took the liberty of asking him one question, Whether he had seen this watch in my hand, whether he had seen it fall from me? He declared he did not. I then asked him, whether he could take upon himself to swear, from the situation he stood in at the adjoining booth, that this watch might not have dropped from some other person: he declared he could not observe any such thing. Gentlemen, with respect to the evidence of Kendrick, he made the same declaration then. Mr. Townsend has brought me here, under the charge of having committed felony; he has told you, Gentlemen of the Jury, that he lost a watch out of his pocket, and that pocket is a waistcoat-pocket; that he was in a very extraordinary situation; that he was on the Race Ground, where certainly the greatest decorum is not always observed; and he was also in a situation which exposed him more to the pressure he complained of, than any other person; for, instead of his horse being in the possession of his jockey or groom, he attended it himself; and I must beg leave to observe, Gentlemen of the Jury, that it is a custom where people bet money at Races, to wish to see the horse immediately after the heat is over, so that the pressure which Mr. Townsend had, or what he thought he had from me, could not appear very extraordinary, and I am under the necessity of saying, his fancy has rather been improved on the occasion. With respect, Gentlemen, to the last Witness that has appeared, I will not say any thing on the occasion; that will rest entirely upon you. It was a circumstance, however, of a most extraordinary nature, that this person should never come forward till the present moment; and whether the contradictions and strange accounts she has given of herself are such as to entitle her to any credit, particularly in a situation where the life or liberty of another is at stake, is not for me to observe upon. Gentlemen of the Jury, it may perhaps be expected by many persons in this place, that I should say a great deal about prepossession and newspaper reports, and if I had the ability to do it, perhaps I should not be blamed; for he who has been the unhappy object of much defamation, has surely a right to deprecate its baneful effects;—where much pains have been taken to defame, some pains may be surely allowed to abate that defamation. Gentlemen, that it has been the hard lot of some unhappy persons, to have been convicted of crimes they did really not commit, less through evidence than ill-natured report, is *doubtless certain*; and doubtless there are many respectable per-

persons now in Court, fully convinced of the truth of that observation. Such times, it is to be hoped, are past; I dread not such a conviction in my own person: I am well convinced of the noble nature of a British Court of justice; the dignified and benign principles of its Judges; and the liberal and candid spirit of its Jurors.

Gentlemen, life is the gift of God, and liberty its greatest blessing; the power of disposing of both, or either, is the greatest man can enjoy. It is also advantageous that, great as that power is, it cannot be better placed than in the hands of an English jury; for they will not exercise it like tyrants, who delight in blood; but like generous and brave men, who delight to spare rather than to destroy; and who, not forgetting they are men themselves, lean, when they can, to the side of compassion. It may be thought, Gentlemen of the Jury, that I am applying to your passions, and if I had the power to do it, I would not fail to employ it; the passions animate the heart, and to the passions we are indebted for the noblest actions; and to the passions we owe our dearest and finest feelings; and when it is considered, the mighty power you now possess, whatever leads to a cautious and tender discharge of it, must be thought of great consequence; as long as the passions conduct us on the side of benevolence they are our best, our safest, and our most friendly guides. Gentlemen of the Jury, Mr. Townsend has deposed that he lost his watch, but how I trust is by no means clear; I trust, Gentlemen, you will consider the great, the almost impossibility, that having had the watch in my possession for so long a time, time sufficient to have concealed it in a variety of places, to have conveyed it to town, it should still be in my possession. You have heard from Mr. Townsend, that there was an interval of at least half an hour between the time of losing the watch and my being taken into custody: there is something, Gentlemen, impossible in the circumstance: and, on the other hand, it has sometimes happened, that remorse, a generous remorse, has struck the minds of persons in such a manner, as to have induced them to surrender themselves into the hands of justice, rather than an innocent person should suffer. It is not therefore, I suppose, improbable, that if Mr. Townsend lost his watch by an act of felony, the person who had the watch in his possession, feeling for the situation of an unhappy man, might be induced to place that watch on the ground. But it is by no means certain how Mr. Townsend lost his watch, whether by an act of felony or whether by

accident; it might have fallen into the hands of some other person, and that person feeling for my unhappy situation, might have been induced to restore it. I humbly hope that the circumstances of the case are such as may induce a scrupulous Jury to make a favourable decision; and I am very well convinced that you will not be led by any other circumstances than those of the present case; either from reports of former misfortunes, or by the fear of my falling into similar ones. I am now just thirty-two years of age, (I shall be so next month); it is nearly half the life of man; it is not worth while being impatient to provide for the other half, so far as to do any thing unworthy. Gentlemen, in the course of my life I have suffered much distress; I have felt something of the vicissitudes of fortune; and now, from observation, I am convinced, upon the whole, there is no joy but what arises from the practice of virtue, and consists in the felicity of a tranquil mind and a benevolent heart; sources of consolation which the most prosperous circumstances do not always furnish, and which may be felt under the most indigent. It will be my study, Gentlemen, to possess them; nor will the heaviest affliction of poverty, pain, or disgrace, cause me to part with resolutions founded on the deepest reflection, and which will end but with life: I will perish on the pavement before I will deviate from them. For my own part, whatever your verdict may be, I trust I shall be enabled to meet it with a firmness of mind; he, indeed, has little to fear from death, whose fame is tarnished, and who has endured the ceaseless abuse of unfeeling minds; when Heaven accepts contrition, it receives into favour when it pardons; but man, more cruel than his Maker, pursues his offending brother with unrelenting severity, and marks a deviation from rectitude with a never dying infamy, and with unceasing suspicion and reproach, which seem to exclude him from the pale of virtue. Gentlemen of the Jury, the thought of death may appal the rich and prosperous, but on the other hand the unfortunate cannot have much to fear from it; yet the tenderness of nature cannot be quite subdued by the utmost degree of human resolution, and I cannot be insensible to the woes which must be felt by an affectionate companion, and an infant offspring; and there is, besides, a principle in human nature, stronger even than the fear of death, and which can hardly fail to operate some time or other in life; I mean the desire of good fame, under that laudable influence. Gentlemen, if I am acquitted, I will quickly retire to some distant land, where my name and misfortunes will be alike unknown; where harm-
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less manners shall shield me from the imputation of guilt; and where prejudice will not be liable to misrepresentation; and I do now assure you, Gentlemen of the Jury, that I feel a cheering hope, even at this awful moment, that the rest of my life will be so conducted, as to make me as much an object of esteem and applause, as I am now the unhappy object of censure and suspicion.

Mr. Townsend—My Lord, permit me to say a word.

Court.—by no means in the world, not a word.

Court to prisoner.—Have you any witnesses?

A.—No my lord.

LORD CHIEF BARON.—Gentlemen of the Jury, this prisoner, George Barrington, stands indicted for stealing a gold watch, a gold chain, three cornelian seals, set in gold, and a metal key, the property of Henry Hare Townsend, Esq. and this being the whole of the indictment, I need not state to you that it is not a capital offence, but it is a charge of single felony. *Mr. Townsend tells you—(Here the learned Judge summed up the evidence, and then added:)*

This is the whole of the evidence; you see what is the result of it. The result is, that Mr. Townsend having somehow or other lost his watch, he not able of his own knowledge to describe the circumstances of having lost it, concludes that his pocket was picked of it somewhere, not that he dropped it: then the circumstances that go to fix the guilt on the prisoner are these: that he was seen close to Mr. Townsend in a way that alarmed him, and he expressed surprise that he should be pushed upon in the way he was, and in a situation that might afford an opportunity to a man who was disposed to make use of it, to have taken his watch: that foundation being laid, they go further, and they endeavour to satisfy you that this watch was in fact in the prisoner's custody, for all the circumstances relative to the dropping of the watch, go to that, and that he endeavoured to get it out of his custody for fear the possession of it should (as it certainly would) be a very evident proof of his having taken it: to be sure, if a gentleman loses his watch in the crowd of a race ground, and it is found afterwards on a man who does not give a good account of it, and on whom any suspicion can fasten, it calls upon him to answer for such possession; but it certainly is liable undoubtedly to all kind of explanation, because if a watch was found on a man of such character as Mr. Townsend, the prosecutor, who would convince all the world that he would not commit such a crime, and he was to say he found it, the case would be extremely different: but they do not prove simply that the watch was found

found there, but that it was seen in the act of falling; and that would have left it open to the possibility of its being thrown down, or falling from some other person: but if it be true that it was in his possession, then it is necessary for him to give you a satisfactory account how he came by it. He has addressed himself to you, by way of defence, and he has added every thing that could interest you in his favour; in the general item of his distress to you he has also made all the observations that I think could be made, on his part in his favour, and you have heard them with attention, and you will do him the justice to give them all the weight they deserve; but you will give them no more weight than they deserve, and you will therefore judge, now whether to you it appears with sufficient certainty, that that watch fell from the prisoner, when he was in the booth; and if it did, whether that, together with the other circumstances, of his being seen at first by Mr. Townsend in the way he describes, do not convince you that he must have been either the person that took this watch; or connected with those that did. In either case you will find him Guilty: on the other hand, if you on the observations he has made to you, or on others that occur to yourselves, see any reason to believe, that the charge does not conclude against him, with sufficient certainty that he was the man, then you will acquit him.

The Jury instantly found him GUILTY.

After the verdict was pronounced, the Lord Chief Baron thus addressed the Prisoner:

Mr. Barrington, Hitherto I have conducted myself towards you on this trial, as if I had never seen you before; but now, when nothing which I can say can prejudice the Jury, I must say that you have been treated with much more favour than you deserve. This ought to have been a capital indictment, and it ought to have reached your life: and public justice very much calls for such a sacrifice; for if ever there was a man in the world that abused and prostituted his talents to the most unworthy and shameful purposes, you are that man; and you have done it against all warning, against the example of your own case, and of a thousand other cases that have occurred; and I am afraid, that now, as the punishment does not reach your life, I cannot entertain the least hope that you will in any manner reform; but that the end of it will be, that you must be a shameful spectacle at your latter end.

He was afterwards sentenced to be transported for Seven Years.

Adjudged CASES in the COURT OF COMMON PLEAS,
in the last Term.

ROE on the demise of EBERALL and others, also on the Demise of ANN WESTON, and also on the Demise of MARY WESTON HARPER, v. LOWE, POWEL, and DAVIES, claiming by distinct Titles.

This was a Case reserved at the last Warwick Assizes for the opinion of this Court; upon the trial of the ejectment there, a verdict having been found for the lessors of the plaintiff, subject thereto.

C A S E.

John Smith of Sherborne, in the county of Warwick, clerk, deceased, being seised in fee of the premises mentioned in the declaration, by his will of the 24th of December, 1625, after reciting, that on the 21st day of December then past, he had surrendered a copyhold messuage and cottage with the appurtenances, situate in Knowle in the said county, then in the occupation of Robert Weston, being of the value of 11 *l. per annum*, into the hands of the lord of the manor of Knowle, by two customary tenants, according to the custom there, to such uses as were and should be contained in that his will, did bequeath, and his will and desire was, that the inheritance of the said copyhold lands should be granted unto Rowley Ward, Esq. Thomas Cowper, and John Savage, or to such two of them as the said Rowley Ward should think fit, and their heirs; and he did, as much as in him was, grant and direct the said copyholds to them and their heirs, and the rents, issues, and profits thereof, to the uses, intents, and purposes, thereafter expressed; that is to say, from and after the decease of the said John Smith, his will and desire was, that Susannah his wife should hold and enjoy the same, and take the rents and profits thereof for her life, and that, from and after the decease of him the said John and Susannah his wife, then his will was, that the said Rowley Ward, Thomas Cowper, and John Savage, or such as should be new takers thereof as aforesaid, and their heirs, should for ever stand and be seised thereof; and that the rents, issues, and profits thereof, should for ever afterwards be employed and disposed of in the buying and making up ten gowns yearly, against the feast of Christmas,

for ten poor men of the parish of Saint Mary, in Warwick, such as the said Rowley Ward whilst he lived, and after his death such as the said Thomas Cowper, and John Savage, and others succeeding them in the trust concerning the said copyhold lands, should think fit; and his will was, that the herdsman of St. Mary's for the time being should be one; also his will and desire was, that the *rent of the said copyhold lands, being 11l. per annum, should never be improved or raised, but should continue at 11l. per annum; and that the said Robert Weston, who was then tenant, and his children and posterity which should succeed, should never be put forth, or from the same, but always continue the possession of the said copyhold premises, paying the same yearly rent duly from time to time, and to and for the purposes aforesaid, and not otherwise; and his mind and will was, that all chief rents and other payments, in respect of the said lands, should be from time to time satisfied and discharged out of the rents, issues, and profits thereof respectively; and directed, that there should be, from time to time, two persons trustees at least *estate and interested in fee* of, and in his aforesaid copyhold lands, to and for the purposes aforesaid; and that after the death of Rowley Ward, Esq. and either Cowper or Savage, the bailiff of the town of Warwick for the time being should, within one month, nominate another trustee of the aforesaid lands, with the survivor of the aforesaid Rowley Ward, Thomas Cowper, and John Savage.*

That the said John Smith died without revoking his said will; that Robert Weston, by virtue of the said will, enjoyed all the said premises during his life, and paid the said yearly rent of 11l. unto the said trustees named in the said will, and to the persons claiming under them as trustees for the time being; and, after the decease of the said Robert Weston, Thomas Weston, his only child, enjoyed the same during his life, and paid the said yearly rent of 11l. unto the trustees named in the said will, and to the persons claiming under them as trustees for the time being; and after the decease of the said Thomas, Sarah, the only daughter of the said Thomas, who intermarried with Francis Harper, and he the said Francis Harper, in like manner, held and enjoyed the same during their lives, and paid the said yearly rent of 11l. unto the said trustees named in the said will of the said John Smith, deceased, and the persons claiming under them as trustees for the time being; and after the death of the survivor of them, the said Francis Harper and Sarah his wife, Thomas Weston Harper, their only child, held and enjoyed the same during his life, and paid the same rent of

11 L unto the said trustees named in the said will, and the persons claiming under them as trustees for the time being; that, some time in or about the year 1737, the said Thomas Weston Harper built a small house and shop on part of the said premises, and duly made and executed his will bearing date the 4th day of March, 1738, and did thereby will and devise, and, as far as in him lay, give, and devise, all and singular the said premises devised by Smith's will, and all his estate, right, title, and interest therein, or thereto, (except the said house, shop, &c.), unto his eldest son Thomas Weston Harper, his heirs or assigns, for ever, he and they paying out of the same the said yearly rent of 11 L. according to the will of the said Smith, and thereby as far as he could for ever disburthening the said house, shop, &c. from the payment of the same, or any part thereof, to the end that that part of the premises might be held and enjoyed free from the payment of any rent whatsoever; and as to the said house, shop, &c. being then in the tenure of the second son, John Weston Harper, he devised the same and all his estate, right, title, and interest therein, and thereto, disburthened as aforesaid, unto his said son John Weston Harper, his heirs and assigns for ever: he also gave several pecuniary legacies to his other children, and bequeathed the residue of his personal estate unto his son Thomas Weston Harper, and appointed him his executor: that the said first-named Thomas Weston Harper died in the year 1741, leaving issue three sons, viz. Thomas Weston Harper, his eldest son, John Weston Harper, his second son, and William Weston Harper, his youngest son, and without having altered his will; that, upon the death of the said Thomas Weston Harper, the father, John Weston Harper, his second son, entered upon such part of the said premises as was devised to him by his said father's will as aforesaid, and enjoyed the same during his life, and died some time in the year 1748, leaving Elizabeth his widow, and two daughters, Mary and Elizabeth, his only children: that after his death the said Elizabeth his widow entered upon and enjoyed the premises last mentioned during her life; and after her decease the said Elizabeth, the daughter who intermarried with Thomas Parkes, entered upon and enjoyed the said last-mentioned premises: that by an indenture bearing date the 30th day of December, 1777, and made between John Bracknell and Mary his wife, (which Mary was one of the two daughters and co-heiresses of the said John Weston Harper the devisee in 1738), Thomas Parkes the younger, the eldest son and heir of the said Thomas Parkes, by Elizabeth his wife lately deceased,

deceased, (who was the other daughter and co-heiress of the said John Weston Harper) of the one part, and Edward Lockman of the other part, for barring all *estates tail* in the premises last mentioned, and for limiting the inheritance thereof to the uses thereafter expressed, it was agreed, that the said John Bracknell, and Mary his wife, Thomas Parkes the elder; and Thomas Parkes the younger, should levy a fine *sur consuance*, &c. of all that messuage or tenement, &c. &c. at Katherine à Barne's Heath, in the parish of Hampton in Arden, which premises were thentofore in the occupation of the said John Weston Harper, and since of Elizabeth Weston Harper his widow, and then of the said Thomas Parkes senior, and of all other the messuage, lands, tenements, and hereditaments, of them the said John Bracknell, and Mary his wife, Thomas Parkes the elder, and Thomas Parkes the younger, any, or either of them, in the parish of Hampton in Arden aforesaid, *which were in fact those devised to John Weston Harper by the said will of the first named Thomas Weston Harper in 1738, and part of the premises devised or mentioned to be devised in and by the will of the said John Smith, and described to be in the occupation of the said Robert Weston*; the uses of such fine were declared, as to one moiety of the premises, to such uses as they the said John Bracknell and Mary his wife should, during their joint lives, by any deed or writing under their hands and seals executed in the presence of two or more witnesses, direct, limit, and appoint, and for want of such appointment to the use of the said John Bracknell and Mary his wife for their several lives, with remainder to the said Mary in fee; and, as to the other moiety thereof, to the use of the said Thomas Parkes the elder, and Thomas Parkes the younger, in fee as joint-tenants.

That in Trinity Term, 18 Geo. III. a fine was duly levied with proclamation in consequence of the last-mentioned deed. That by indenture of lease, and release of the 18th, and 19th of May, 1778, between the said John Bracknell and Mary his wife of the one part, and the said Thomas Parkes the elder, and Thomas Parkes the younger, of the other part, they the said John Bracknell and his wife, in consideration of 10*l.* 10*s.* to them paid by the said Thomas Parkes the elder, and Thomas Parkes the younger, did (in pursuance of the last abstracted indenture) grant, &c. unto the said Thomas Parkes the elder, and Thomas Parkes the younger, an undivided moiety of all the last-mentioned premises, to hold unto and to the use of the said Thomas Parkes the elder, and Thomas Parkes the younger, in fee as joint-tenants.

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The case then set forth several conveyances of the undivided moiety of Parkes the elder and younger to Davis the defendant in fee. It then stated, that the premises devised to John Weston Harper by his father the first-mentioned Thomas Weston Harper, aforesaid, were wholly in the parish of Hampton in Arden, but not within the manor of Knowle, and were part of the premises devised, or mentioned to be devised, in and by the said will of the said John Smith, and described to be in the occupation of the said Robert Weston; and that it did not appear that they were held of any other manor: that the Defendant Davis, was in possession of the said premises under the said conveyances above mentioned; and that he and those under whom he derived his title to the same by virtue of the will of the first-named Thomas Weston Harper, and the conveyances above mentioned, have quietly and uninterruptedly enjoyed the same, without contributing to any part of the said rent of 11 *l.* and without any entry or claim made by the lessors of the plaintiff, or any of them, or any person, or persons under whom they or any of them, derive their, his, or her title, from the year 1741, until the present ejectment brought: that Thomas Weston Harper, the eldest son of the said testator, the said first-named Thomas Weston Harper, entered upon the premises in the parish of Hampton in Arden aforesaid, devised to him by the said first-named Thomas Weston Harper in the year 1741, which were part of the said premises devised, or mentioned to be devised, in and by the said will of the said John Smith, and described to be in the occupation of the said Robert Weston, and enjoyed the same during his life, and died leaving a daughter Martha, his only child; and by his will bearing date the 10th of June, 1742, gave to his said daughter and only child Martha 100 *l.* and several other legacies to his wife and other relations; and in case his personal estate should not be sufficient to pay his legacies, he charged the farm, land, and premises, devised to him by the said first-named Thomas Weston Harper with the payment thereof; and subject thereto he also gave, devised, and bequeathed, all and singular the said premises unto his brother William Weston Harper, in fee, to whom he also bequeathed the residue of his personal estate, and appointed him sole executor of his will: that the said Thomas Weston Harper the son died soon after making his will; and upon his death William Weston Harper his brother and devisee, entered upon and enjoyed the premises devised to him as aforesaid during his life, and by his will bearing date the 19th of September, 1772, devised to his son Thomas Weston Harper, in fee, all the premises devised to him

him the said William Weston Harper, by the will of his said brother the said Thomas Weston Harper deceased as aforesaid; he also gave the use of a room in the dwelling-house unto his wife Ann Weston for her life, if she continued unmarried; and gave to his two daughters Mary and Sarah 40 *l.* a-piece, &c. &c. That the said William Weston Harper died soon after making his will leaving the said Thomas Weston Harper his eldest and only son, and two daughters Mary and Sarah, which Sarah was his youngest daughter, but who afterwards died. That the last-named Thomas Weston Harper entered upon the premises devised to him by his father's will as aforesaid, and being in the possession thereof by lease and release, and a fine *sur consance de droit, come ceo*, &c. conveyed to the defendant Lowe in fee four closes of land containing about thirteen acres, situate in the parish of Hampton in Arden aforesaid, part of the premises devised or mentioned to be devised in and by the will of the said John Smith, and described to be in the occupation of Robert Weston. That Lowe has quietly enjoyed the said premises under the said lease, release, and fine, and that no actual entry hath been made by the lessors of the Plaintiff, or any of them, and that the said premises and no part thereof are within the manor of Knowle, but are part of the lands and tenements devised or mentioned to be devised in and by the will of the said John Smith, and described to be in the occupation of the said Robert Weston in manner aforesaid; and it did not appear that they were held of any other manor. That the Defendant Joseph Powell, who was in possession of, and claimed title to, the premises after-mentioned situate in the manor of Knowle, and parish of Solihull (and which were the remaining part of the premises devised by Thomas Weston Harper the testator, in 1742, to William Weston Harper as aforesaid, and by the same William devised to his son Thomas Weston Harper), derived his title thereto in manner aftermentioned (that is to say), by indenture of the 13th of April, 1775, between the said Thomas Weston Harper, the devisee in the will of the said William Weston Harper, of the one part, and the said Powell the Defendant, of the other part, whereby the said last-named Thomas Weston Harper in consideration of the rents, &c. demised to Powell, all the premises devised by the said will then in his occupation, consisting of a farm-house, buildings, garden, and upwards of thirty acres of land from Lady-day then last for twenty-one years, under the yearly rent of 30 *l.* with the usual covenants; and it was it thereby agreed, by the said Thomas Weston Harper, that his mother the said Ann Weston

ton should have one room in the dwelling-house (if she thought proper to demand it) during the term, in case she so long lived; and the said Thomas Weston Harper also agreed during the term to attend the said Joseph Powell yearly to Warwick to see the 11l. a-year paid to the corporation before the rent of 30l. should be demanded. By indenture between the said Ann Weston Harper (the widow) and the said Thomas Weston Harper the son of the said William Weston Harper deceased, of the one part; and the said Joseph Powell (the Defendant) of the other part; in consideration of 85l. to the said Ann Weston Harper and Thomas Weston Harper paid by the said Joseph Powell, they the said Ann Weston Harper and Thomas Weston Harper did demise, grant, bargain, sell, and assign, unto the said Joseph Powell, his executors, administrators, and assigns, all the messuage or tenement, buildings, lands, and premises, demised by the last-mentioned deed, and which were then in the tenure of the said Joseph Powell, to hold unto the said Joseph Powell, his executors, administrators, and assigns, from the date thereof, for the term of 2000 years, *sans waste*, charged with the payment of 11l. a-year to such persons, and to and for such uses, intents, and purposes, as were by the will of the said John Smith for that purpose mentioned and appointed, and under the rent of a pepper-corn payable to the said Ann Weston Harper and Thomas Weston Harper at Michaelmas yearly; with the usual covenants, and thereby Powell covenanted to pay the said rent or charge of 11l. a-year, pursuant to the will of the said John Smith, and all taxes, &c. that the consideration money in the said last-mentioned indenture was duly paid; that Robert Weston and those deriving title under him, were not, nor were any or either of them, ever admitted tenants of the said copyhold of the said manor of Knowle, of or for any part of the estate, and premises, devised by the will of the said John Smith, nor ever made any surrender of any part thereof to the use of any will or other instrument. That on the 24th of October, 1744, at a court leet, and court baron, held for the manor of Knowle, it was presented by Charles Petit as copyholder, and allowed by the homage, that Henry Mander, of Warwick, gent. one of the aldermen of the borough of Warwick aforesaid, did out of court, on the 23d day of October then instant, surrender by the hands of the said Petit, his attorney, all the right, interest, and estate, of him the said Henry Mander, of, in, and to all that messuage or tenement, &c. &c. situate in the said manor near a place called Catherine à Barne's Heath then in the tenure of ——— Harper, (which premises were formerly the estate of

of John Smith, clerk, deceased, who surrendered the same to, for, and upon the several uses and trusts in his last will mentioned:) to the use of John Stanton, Esq. John Richardson, Edward Croft, John Dadley, Isaac Twycrofs, John White, William Collins, and Nicholas Rothwell, of the said borough, aldermen (pursuant to the directions and appointment of Robert Hands, gent. mayor of the said borough) and to their heirs, and assigns, nevertheless to, for, upon, and under the several uses, trusts, and limitations, contained in the said will of the said Smith, according to the custom of the said manor: and to this court came the said Stanton, Richardson, White, and Collins, and were admitted, and paid 20*l.* for a fine, but Dadley and Rothwell were not admitted; *that the admittance of Ward and the other trustees in Smith's will, and those who succeeded from his death until 1744, do not appear by the rolls of the manor of Knowle*: That on the 30th January 1779, Isaac Twycrofs the surviving trustee in the copy of the court-roll of the 24th October 1744, surrendered out of court according to the custom of the manor of Knowle, all the right, title, and estate, of him the said Isaac Twycrofs, of, in, and to, all that messuage or tenement, &c. &c. situate, lying, and being within the said manor of Knowle, at or near a certain place called Catherine à Baine's Heath, theretofore in the tenure of Harper, his assigns, or under-tenants, and then of the Defendant Joseph Powell; all which premises were formerly the estate of the said John Smith, clerk, long since deceased, who surrendered the same to, and for, and upon, several uses and trusts in his last will mentioned and contained, or in whatsoever other manner the same premises could or might be better known or described, to the use of Joseph Eberall, esq; mayor of the borough of Warwick aforesaid, and the said Isaac Twycrofs, and of George Eberall, John Hands, Robert Moore, George Cattell, John Sharp, William Roe, Francis Hiorne, Charles Francis Greville, Charles Porter Packwood, John Michell, and Bernard Geary, of the same borough, aldermen, pursuant to the directions of the said Joseph Eberall the mayor, and to their heirs and assigns, nevertheless to, for, and upon, the several uses, trusts, and limitations, mentioned and contained in the will of the said John Smith; and at a court leet, and court baron, held for the said manor, on the 5th of October 1781, the said John Mitchell, the then mayor, and Joseph Eberall and the other surrenderees, the aldermen above mentioned, were admitted by Thomas Greenway, a person appointed by their letter of attorney for that purpose: that Isaac Twycrofs, George Eberall,

Eberall, John Hands, and William Roe, are since dead : that the lessors of the Plaintiff (except Ann Weston and Mary Weston Harper) are the survivors of the said trustees who were admitted in 1781. That the said rent of 11*l. per annum* was regularly paid by the family of Weston unto the trustees for the time being, claiming under the said will of the said John Smith deceased, until the conveyance made by the said last-named Thomas Weston Harper to the defendant Powell above mentioned, who hath since *regularly paid* the same down to Michaelmas, 1787, unto the said trustees for the time being, claiming under the said will of the said John Smith, and hath *since duly tendered the same* to the said John Sharp, one of the said trustees, to Michaelmas last : that the defendant John Lowe *has never contributed to the payment of the said rent, or any part thereof*. That on the 31st of March 1788, notices were given to the defendant Powell and to the respective tenants of the premises claiming under the defendants Lowe and Davies, signed by all the trustees aforesaid, except the said John Mitchell, on behalf of themselves and him the said John Mitchell, to quit the premises in the respective occupations of such tenants, and which are expressed in the several notices to be situate in the manor of Knowle, at Michaelmas then next following, old stile, being the end of the year, and the time when the said annual rent of 11*l.* became due : that Ann Weston, one of the lessors of the plaintiff, is the widow of the said William Weston Harper ; that Mary Weston Harper, another of the lessors of the plaintiff, is the sister and heir at law to the last-named Thomas Weston Harper, and heir of the said Robert Weston, according to the custom of the said Manor of Knowle, which is Borough English, but not being descended from the eldest son of the grandfather, Thomas Weston Harper, she is not the heir of the said Robert Weston according to the common law of descents : that, by the custom of the said manor, lands and tenements may be intailed, and the youngest son of the person last seised of any copyhold estates therein, whether in fee simple, or tail, is the customary heir ; and, if no son, the youngest daughter is the customary heir, and that the same custom extends to collateral heirs ; and by the custom of the said manor estates are passed from one to another by *surrender, and admittance, by will and surrender* to the use of it, or by descent ; and by *no other means whatsoever* ; and estates tail of lands or tenements are barred *by surrender, and admittance, and by no other means whatsoever*.

It was admitted that the freehold estate passed by the fine ; the main question therefore was, whether the lessors of the plaintiff were intitled to the copyhold lands in possession of Powell ?

LORD LOUGHBOROUGH, Ch. J.--On this case it is clear that the verdict must be entered for the defendants Lowe and Davies, as to the premises in their respective occupations ; first, because no title is shewn in any of the lessors of the plaintiff to the freehold lands ; secondly, because the fine in one case, and the length of adverse possession in the other, would bar an ejectment.

With regard to the copyhold lands, the first question is, Whether the lessors of the plaintiff in the first demise have shewn a title ? It is fairly objected, that they do not derive a title by distinct surrenders from the persons named in the will of Smith. But they shew a title by surrender from a surviving trustee in 1744. It may then be presumed, that antecedent to that surrender the estate had been duly conveyed, and it is not competent to the defendant Powell, who has constantly paid the rent of 11*l.* to the trustees, to object to their title to receive it ; and they could have no other title but as under the appointment of that will. The next objection is, that they are mere trustees with respect to the estate, and shall not recover the possession from the *cestui que trust*, while the rent of 11*l.* is duly paid ; on which the following points arise. 1*st.* Whether any, and what estate is given by the will of Smith to Robert Weston ? 2*d.* In whom the right of Robert Weston is now vested ? 3*d.* Whether this is a case in which a court of law can stop the effect of a legal title to obtain possession ? The will of Smith, with respect to Robert Weston, is argued to import a mere recommendation of him and his family to be continued tenants ; and it is said that a direction not to raise the rent would be void, as repugnant to the estate given ; to support which position two cases from 2 Vern. 596. & 746, were cited. But those cases are not applicable. In the one, the trustees of an estate given to a charity had thought fit to impose such a condition ; in the other, the Chancellor had established it on a proposal for the benefit of the trust estate. In both, the act was done without due authority. But a testator in giving his estate may impose any terms consistent with the rules of law, and it can only be a question on the intention, when bequests
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seem to encounter each other. In the present case, the devisees take no benefit, they are mere trustees. The object of the charity is limited, and the sum defined. The direction to continue the possession of Weston, and his children, and posterity, paying that sum, is as positive as the direction, to lay out the 11*l.* and to distribute the gowns bought with it to ten poor men. The trustees are as much bound to support one bequest as the other. But although it is clear that the Weston family are the objects of a trust in this will, it is far from being clear in what manner the bequest in their favour is to take effect. It is not a necessary conclusion, that *some* estate must pass to them by the will. It must be allowed, that a condition to pay a rent for ever will create an estate in fee, as in the cases cited from 3 Bulstr. 194, and that "posterity" may be a word of limitation, as in the cases cited in the first argument. But all these cases are upon words annexed to an express devise of an estate. In this will there is no express devise to Robert Weston. It is only, that "he who was then tenant, and his children and posterity, should never be put forth but continue the possession." The idea of the testator seems to have been a perpetual tenancy at a fixed rent. Thinking the bequest imperative to the trustees, I do not know but that trust might have been well executed by granting leases for years renewable. I am not sure that it would be a breach of trust to follow either the course of succession to personal estate, on the legal course of descent in continuing the *possession* to the posterity of Robert Weston. But supposing that the trust is executed in the trustees, and that an estate passed to Robert Weston, the words, "to his children and posterity who should succeed," must confine it to an *estate tail*. An estate to a man and his *children*, if he has none-born, is an estate tail according to Wild's Case, 6 Co. 36. b. *Posterity* goes still further. It is an exclusion of collateral heirs, and must cut off the fee-simple by necessary implication. If then any estate passed to Robert Weston, it was an equitable estate tail of a copyhold, descendible by the custom in Borough English, and the lessor of the plaintiff Mary Weston Harper is heir in tail unless it were barred. This brings it to the question, Whether the estate tail is barred? It was argued, that it was barred by the will of Thomas Weston Harper. Now, though it is true, that the devise of an equity in a copyhold requires no surrender, yet that is where the testator has a devisable estate. The entail must first be barred. The party must have done some antecedent

tecedent act to enable him to devise. Here no such thing was done. And the will of Thomas Weston Harper did not operate long : there was no length of possession against the entail on which to presume a surrender. But it is said, that the entail was barred by the deed of the younger Thomas Weston Harper. But it would require a good deal of argument to prove that a lease, made by the equitable tenant in tail of a copyhold, should be a bar of the entail. It is not clear then that the estate tail was *de facto* barred by any act of the tenant ; it not, then Mary Weston Harper is intitled as heir in tail. But supposing it to have been barred, and that William Weston Harper was tenant in fee, then she is intitled as customary heir at law. Yet on that supposition is it clear that Powell is intitled to hold against the plaintiffs for the term of 2000 years? He takes a lease for 21 years at the yearly rent of 30 *l.* A few weeks after this he has a conveyance of the same premises for 2000 years in consideration of 85 *l.* But this consideration was grossly inadequate ; it was not five years purchase. It must therefore have been either a mortgage to secure the sum of 85 *l.* or a purchase evidently fraudulent, and only obtained by some imposition of an ignorant man. If it were a mortgage, the mortgagee had no right of possession as long as the money was paid. If it were a fraudulent purchase, there could be no equitable title. Then the third question is, whether there is such an equity, as can obstruct the clear legal title of the Plaintiffs in the first demise to obtain possession? Now the rule is, that, unless in the case of a clear trust, the equitable title of *cestui que trust* shall not be set up against the legal title of the trustee ; and in the present case it is not clear who is the *cestui que trust*. If the trusts are not clearly executed in favour of any one, it is fit that the trustees should be in possession, and, if any remedy is required, it must be sought in another place.

We are therefore of opinion that a verdict must be entered for the lessors of the Plaintiff in the first demise as to the premises in the occupation of Powell.

Adjudged

Adjudged Cases in the Court of KING'S-BENCH, &
in the last Term, 1790.

The KING v. the Inhabitants of LEIGH.

The overseers of *Leigh* in Staffordshire rated to the poor an inhabitant of the township of *Field* within the same parish, which township had for many years maintained its own poor, independent of the rest of the parish. This inhabitant therefore appealed against the rate, and the Sessions qualified the rate, subject to the opinion of this Court.

C A S E.

The parish of *Leigh* is five miles in length, and four and a half in breadth. It consists of eight townships. The township of *Field* (one of the eight) is within the said parish, and consists of six farm-houses, with farms thereunto belonging, containing 700 acres of land, and 3 or 4 small houses. The town of *Field* for 60 or 70 years (and before for any thing that appears to the contrary) has had separate overseers, and separately maintained its own poor. Two overseers have been appointed for the township of *Field*, and two for the rest of the parish of *Leigh*. A constable has regularly been appointed for the township of *Field*, and another for the rest of the parish. In 1764 a pauper was removed by an order of two justices from the parish of *Leigh* to the township of *Field* within the said parish, from which it does not appear that there was any appeal.

LORD KENYON, Ch. J. I cannot help regretting that this question should ever have been started, because it tends to disturb the quiet of this place where the poor have been so long provided for in a particular way. It is of some importance to one's own mind, though it cannot indeed affect the decision of this case, that the gentlemen of this county have considered this as an attempt which ought not to have been made, as being an innovation on the old settled mode of maintaining the poor in this district. There is no doubt but that this Case is within the 13 & 14 Car. II. c. 12. In some of the cases it has been made a question whether the particular district were or were not a vill or township: but no
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such difficulty occurs in this Case, because it is stated as a fact that Field is a township. Then the question is, whether at the time of passing the statute of *Car. II.* this district was in a situation to receive the benefit of the 43 *Eliz. c. 2.* ? for if the parish were properly divided at that time, nothing which has happened since will induce us to make any innovation: In the Cases cited, *Peart v. Westgarth*, (3 *Burroughs*, 1610.), and *R. v. The Justices of Middlesex*, (*Bott.* 17. 21), it was stated that, from the time of *Elizabeth* down to the reign of *George the First*, those parishes had in fact reaped the benefit of the statute of *Elizabeth*: whereas here for 60 or 70 years, and perhaps for a longer period for any thing that appears to the contrary, this parish has been subdivided. and has not had the benefit of that statute. This therefore is like the Case of *The King v. Sir Watts Horton*. (1 *Term Rep.* 374.) It has been doubted by country gentlemen whether the poor are better maintained in large or small districts, though the former has been judicially said in this Court. In small divisions the officers are more attentive to their duty, and in the part of the country with which I am acquainted the poor are better provided for in the small districts. Therefore as the usage in this Case coincides with our ideas on the policy, and as we are warranted by the adjudged Cases on this point, we think it highly proper that the division of this parish, which has subsisted so long, should continue; and consequently that the order of Sessions should be affirmed.

ASHMURST, J. Wherever it appears that for any length of time the parish has had the benefit of the 43 of *Elizabeth*, it must be shewn that from the increase of population, or some other cause, it is impossible that they can continue to reap the benefit of that statute. But that is not the case here: and nothing can be stronger to shew that this parish cannot have the benefit of 43d of *Elizabeth*, than that in fact they have not had it as far back as any memory goes.

BULLER, J. Before a parish can be sub-divided into smaller districts for the maintenance of their poor, it must appear that they cannot have the benefit of the 43d of *Eliz.* But it is material to consider the meaning of the phrase, that a parish cannot reap the benefit of that statute. It does not mean that it is absolutely impossible for them to maintain their own poor, as a parish, for that would not be the case even if the parish were 100 miles in circumference, but that it is inconvenient for them so to do. Now in judging on a question of convenience there can be no doubt on the facts of this Case; for it is stated that for 60 or 70 years past,
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and perhaps for all preceding times, this parish have not maintained their own poor jointly. And the strongest instance of their having been sub-divided for a long period is the circumstance of the parish at large having removed a pauper into this particular district, as a place liable to maintain its own poor separately. I entirely agree with my Lord Ch. J. that greater care is taken of the poor in small than in large districts. And if in any Case we were to find that it was formerly inconvenient to the parish at large to maintain their own poor jointly, though it were convenient for them to do so now, we would not assist them in overturning the old practice; for that would operate as a discouragement to the efforts of individuals to reduce the poor rates, which have succeeded in many small districts. I even go further; for though it shall appear that a parish had enjoyed the benefit of the 43 *Eliz.*, yet if they could not now conveniently maintain their own poor jointly, we would permit them to divide themselves, provided there be such legal divisions in the parish as are capable of supporting their own poor separately under the provisions of the statute of *Charles* the Second.

GROSE, J. In determining this question, I shall not proceed on any speculation of my own; for the Act of Parliament itself has supposed, that the largeness of a parish may be a good reason for dividing it. Though if I were to give my own opinion of the policy of the law, I should not hesitate to say, that from my own experience I have found that the poor are better provided for in small than in large districts. The question here is, whether it does not appear that the parish cannot have the benefit of the statute of *Eliz.*? and I am clearly of an opinion, that on these facts they cannot. For, in the first place, it does not appear that the parish have ever as a parish maintained their own poor. And, in the next place, it is stated, that in 1764, a pauper was actually removed from the parish at large to this very township, which is an admission on their part that they had no right to call on this district to contribute to the general poor rate of the parish.

Per curiam,

Order of Sessions affirmed.

The KING v. the Inhabitants of GRANTHAM.

C A S E.

William Read was hired a fortnight after Martinmas 1784, by *N. Leadenham* of Allington, farmer, to serve him for a year, at the wages of 6*l.* 10*s.*, and entered upon his service, and continued therein about six weeks, when, with his master's permission, he went to assist his father who then was ill in the said parish of Allington, and with whom he stayed thirteen weeks; at the expiration of which time he returned, in consequence of a warrant having been obtained against him at the instance of his master, into his service under the original contract, and continued with his said master until Sunday evening, three days before the expiration of the year; when his master came home in liquor, abused the pauper, threw him down, and afterwards turned him out of doors. The pauper slept at his father's that night in Allington, and the next morning his master would have had him return to his service, and stay the remainder of the year; but the pauper refused going into his master's service again, and threatened that, unless he paid him the whole of his wages, he would complain of the ill-usage he had received to a magistrate. The master then agreed to pay him his full year's wages, deducting for the thirteen weeks he was with his father in his illness, which the pauper took, and then left his master's service *contrary to the express request of his master.*

Two Justices having removed the said *William Read* and his family out of the parish of Allington, the Sessions upon appeal confirmed the order, subject to the opinion of this Court.

LORD KENYON, Ch. J. The circumstance stated in the Case, that this transaction happened only three days before the end of the year, might have led us at first to suppose that there was some fraud intended on the part of the master: but none is stated. It has been said, and rightly so, that an *actual* service is not necessary, for that a *constructive* service is sufficient: but the question here is, whether we can say that there was a constructive service for the whole year; and whether the relation of master and servant subsisted during that time? If the absence be for a reasonable cause, it is immaterial

terial whether that absence be at the beginning, the middle, or the end, of the year. And it has been argued that this was an absence for a reasonable cause, on account of the ill treatment of the master. But here there was no *animus revertendi*, which distinguishes the present from the class of Cases alluded to (*R. v. Gresham* and *R. v. Christchurch*). When the servant was ill-used, though he could not have left the service without his master's consent, or without applying to a magistrate to be discharged on that account, yet the master did consent to the servant's leaving him, and both parties agreed to put an end to the contract. If the master had afterwards complained of the pauper's not serving him for those three days, the latter might have answered by saying that the contract was dissolved. And if its being absolutely put an end to only three days before the expiration of the year will not defeat the settlement, what line can be drawn with respect to the time of the service which is necessary to give a settlement? if one day, or three days, may be dispensed with, any other time may be equally so. In some cases indeed, where it has been equivocal what the transaction really was, and the servant has paused and considered whether he would absolutely quit the service or not, other circumstances have been admitted to explain the absence: but here was no suspense, no *locus penitentiae*; for both the master and the servant agreed to put an end to the service. The master wished to turn away the servant, though unwarrantably; and though the latter was not bound by such ill treatment, he afterwards consented to dissolve the contract.

ASHHURST, J. If there be any interruption in the service, however small, it will prevent the servant gaining a settlement. And though an absence does not necessarily defeat a settlement, yet, to prevent that, it must be either with the master's consent, or be such as the law will warrant. But this was neither; for both the master and servant agreed to put an end to the service: and though the former at length consented to give the latter the whole wages, that was not intended to operate as a dispensation with the remainder of the service, but as a redemption of his credit.

Both orders confirmed.

REX, v. *Inhabitants of* CATHERINGTON.

The Sessions having confirmed an order of Justices, removing W. Brookes from Compton, in Sussex, to Catherington, in Hants, a Case was reserved for the opinion of the Court.

C A S E.

The pauper was settled in Catherington before Michaelmas, 1789, by residing upon a freehold-estate, belonging to his wife. He was also intitled to the equity of redemption of a freehold-estate in Compton, consisting of several dwelling-houses, of the annual value of 13*l.* 5*s.* which had been mortgaged by his father to Elizabeth Morey, which mortgage was afterwards assigned to one Ayles. In Michaelmas Term, 1788, Ayles delivered declarations in ejectment to the pauper as landlord, and to the several tenants in possession of the estate in Compton; and thereupon the tenants attorned to Ayles. About Michaelmas, 1789, the pauper asked permission of Mr. Newland, the agent and solicitor for Ayles, to inhabit one of the houses, part of the mortgaged estate, and which was then untenanted, *for the purpose of overlooking some repairs*, which he proposed to do upon the estate with an intention to sell the same, and pay the mortgage-money. In consequence of such permission he went into one of the houses, and inhabited the same for upwards of three months, when he was removed by the present order. The pauper did not, during such residence, do any thing towards the repairs of any of the houses, or towards a sale of the estate. No agreement was made between the pauper and Mr. Newland with respect to any rent to be paid by the pauper for such house.

LORD KENYON, Ch. J.---It has been long established that an equitable title is sufficient to give a settlement. But in the case alluded to the mortgagor was in possession. So, by the act for regulating votes of county elections, either the mortgagor or mortgagee in possession may vote. But in this case the party had neither *jus in re* or *ad rem*.

BULLER, J.---In the case of *R. v. St. Michael's Bath* it was said that either a mortgagor or mortgagee might gain a settlement according to circumstances: one of those circumstances is *possession*: and upon possession all the questions have turned.

Per Curiam.

Both orders confirmed.

Rex

REX v. *The Inhabitants of PIDDLETRENTHIDE.*

Upon an appeal the Sessions confirmed an order of two Justices, removing John Belly and family from Chaldron Herring to Piddletrenthide in Dorset.

C A S E.

For two or three years, while the pauper lived in the parish of Chaldron Herring, he rented in that parish a dairy of thirty cows, some at 5*l.* 10*s.* and others at 5*l.* per cow; with liberty to cut furze on Grange Warren, and on other parts of the farm, for the use of the dairy only; and a warren to kill rabbits for his profit, called Grange Warren, with a small house on it to keep nets, in the same parish, of the same man, at 30*l.* per annum; and also another rabbit-warren in the neighbourhood, called Helworth-warren, for the same purpose, at 15*l.* per annum. The cows were to feed in particular grounds at particular seasons of the year, as is usual in the letting of dairies. The pauper and his man sometimes slept in the house in Grange Warren. The pauper had no right in the soil of either of the said warrens, except that of entering upon and killing rabbits there; the persons of whom he rented the warrens constantly depasturing the same, and ploughing some part thereof.

LORD KENYON, Ch. J.—If we were now called upon for the first time to make a decision on the statute, perhaps I should have some difficulty on the subject: but the courts have put a liberal construction on it. I cannot quite agree with the determination of *R. v. Lockerly* (Burroughs, 315;) because after it had been decided in so many cases that an incorporeal hereditament would give a settlement; I should have thought that case would have received a different determination. But without considering that case, I think that the pauper took a tenement in Chaldron Herring both by renting the dairy and the warren. Lord Coke says that *præsumptura* is a tenement: then the dairy was a tenement. The other taking was also sufficient; for it was, if I may use the expression, a pernancy of the profits of the land by

the mouths of the rabbits. A free warren is the subject of a family-settlement; a *præcipe* will lie for it; and the renting of it is sufficient to give a settlement. If this case had been precisely similar to that of *R. v. Lockerly*, perhaps I should have hesitated before I agreed to overturn that decision; but as this is distinguishable from that case (though the distinction is nice); I think that the pauper gained a settlement in Chaldron Herring.

ASHHURST, J.—It seems difficult to reconcile all the cases on this subject. If the case of *R. v. Lockerly* be law, I do not see how this pauper can have gained a settlement in Chaldron Herring; but as there are authorities both ways, I am inclined to think that a settlement was gained in Chaldron Herring: the criterion, by which the question is to be decided, being the ability of the person taking the tenement.

BULLER, J.—In all doubtful cases one leading ground is, the ability of the pauper to pay the 10*l. per annum*. But, on the facts here stated, I think this person rented a tenement within the construction of the statute of Charles. I cannot agree with the determination of *R. v. Lockerly*; that was considered as a personal contract; but all contracts are, in some respects, personal. The question in such cases really ought to be whether or not it be a contract to receive profits out of land; the present I consider as such; and so was that in *R. v. Lockerly*: I am therefore of opinion, that the conclusion drawn in that case was wrong. As to the other point; I do not consider this merely as a privilege to kill rabbits when the pauper could find them, and that the landlord might take them all if he chose it; but the warren was to be kept in the same state as it was when it was let; otherwise the contract between the landlord and the tenant would be destroyed. In that respect then the pauper had an interest in the land. Besides, he took a house with the warren.

GROSE, J.—It is impossible to reconcile all the cases on the subject; and I do not understand the ground on which that of *R. v. Lockerly* was decided. In these cases I think that if the pauper has credit to rent 10*l. per annum*, he gains a settlement. The case of *Kinver v. Stone* decides the present—

Both orders quashed.

REX v. *Justices of YORKSHIRE.*

In an act for repairing the Road from Halifax to Sheffield, 17 Geo. III. c. 106 it is enacted, that the Surveyors of the Highway shall deliver in to the Trustees of the said Turnpike a list of the inhabitants liable to do statute duty; provided always, "that if any person shall think himself aggrieved by any thing done in pursuance of this act, &c, such person may appeal to the justices of the peace at any general Quarter Session of the Peace, to be holden for the West Riding of the county York, within six calendar months after the cause of such complaint shall have arisen; such appellant first giving ten days notice at least in writing of his intention to bring such appeal, and of the matter thereof, to the clerk or treasurer of the respective trustees, and within four days after such notice entering into a recognizance before some justice of the peace for the said Riding, with two sufficient sureties, conditioned to try such appeal, and abide the order of, and to pay such costs as shall be awarded by, the justices at such quarter sessions; and the said justices at such session, upon due proof of such notice being given as aforesaid, and of the entering into such recognizances, shall hear and finally determine the causes and matters of such appeal in a summary way, and award such costs to the parties appealing or appealed against as they the said justices shall think proper; and the determination of such quarter session shall be final, binding, and conclusive to all intents and purposes."

The Surveyors, having been convicted before a Justice for not delivering in the list of persons liable to statute-duty, as by the act required, appealed to the Quarter Sessions against the conviction, and gave the proper notice of appeal; but neglected entering into the recognizance to try the same within four days after the notice, as required by the Statute; but did it on the 12th day after. The Justices in Sessions, on the ground that the recognizance was not entered into within four days after the notice, dismissed the appeal, and the conviction was of course affirmed. But the Appellants (it being still within six months after the conviction) gave a second notice of appeal to the ensuing sessions, and entered into a regular recognizance. Upon this appeal the Session

refused to proceed on the ground that the former determination was conclusive.

A *mandamus* was now applied for, to compel the Sessions to receive the appeal.

LORD KENYON, Ch. J.—I am of opinion, that the *mandamus* ought not to be granted; for though on the one hand the Legislature have provided that the conviction of the magistrate shall not be final, and have therefore given to the party convicted a power of appealing, yet on the other hand it cannot be supposed that in giving him such power they meant to enable him to harass his prosecutors and heap costs upon them, by preferring informal appeals which could not conclude the matter. On the contrary, I am of opinion that after the appeal was lodged, and adjudged by the justices of sessions to be informal, they were *functi officio*, and could not take cognizance of the second appeal. The stat. 43 Eliz. cap. 2. gives an appeal generally from any lease or tax, or other act done by the church-wardens, &c. Now supposing an appeal lodged against an act done by virtue of that act, which is dismissed by the sessions on the ground of informality, and the original act confirmed, was it ever conceived that a second appeal could be lodged at any time subsequent, and the matter be again brought into judicial discussion? I am clearly of opinion that it could not. If the first appeal is not conclusive, I do not see where the line is to be drawn; or why a second appeal might not equally be lodged, provided it came within the six months, although the sessions had dismissed the first, after going into the merits.

ASHMURST, J. The Legislature thought it proper to give the party convicted a right of appeal; but some consideration was also due to the party against whom that appeal was to be made, that he might not be unnecessarily harassed. The appellant has no cause of complaint, for he has once prosecuted his appeal; and it was his duty to have taken care that it was brought forward in a proper form; but he neglected to do so, in consequence of which the prosecutor has incurred an expence which he has not been reimbursed. It never could have been in the contemplation of the Legislature to permit the party convicted to bring a second appeal on account of his own negligence in the manner of instituting the first; and thereby oblige the prosecutor to incur the trouble and expence of a second litigation before the same tribunal. There must be some period when the proceedings should be closed, and none seems so proper as on the first appeal.

BULLER, J. The act says "that if any person shall think himself aggrieved &c. he may appeal to the justices at any general quarter sessions &c. within six months," that certainly only gives a right of appealing *once*: and the parties here, having had one appeal, are bound by that. If the question had rested solely on the *notice* of appeal for the first sessions which happened, and nothing further had been done, I should not have thought the parties bound by it; for the act gives the power of appealing within a certain time with these two requisites, that the appellant must give ten days notice, &c. and within four days after enter into a recognizance to try his appeal. When the party therefore found out his mistake, he might have stopped there; but he persisted in going on with his appeal, and brought it before the court, and took their judgment upon it. The appellant jurisdiction was therefore fully exercised: and though it was originally in the option of the parties whether they would appeal to the first or second sessions which took place within the six months, yet, having made their election to appeal to the first, they must abide by the judgment there given.

GROSE, J. of the same opinion.

Rule discharged.

FLARTY v. ODLUM.

The Defendant was an insolvent Debtor, and, in order for his Discharge under the Lord's Act, it was requisite he should deliver in a schedule of his effects. The question was, Whether his half pay as a Lieutenant of foot should be included?

LORD KENYON, Ch. J. I am clearly of opinion that this half-pay could not be legally assigned by the defendant, and consequently that the creditors are not entitled to an assignment of it for their benefits. Pensions of this sort are granted for the dignity of the State, and for the decent support of those persons who are engaged in the service of it. It would therefore be highly impolitic to permit them to be assigned; for persons, who are liable to be called out in the service of their country, ought not to be taken from a state of poverty. Besides, an officer has no certain interest in his half-pay; for the king may at any time strike him off the list.

In-

Indeed assignments of half-pay have been frequently made in fact, but they cannot be supported in law. It might as well be contended that the salaries of the Judges, which are granted to support the dignity of the State and the administration of justice, may be assigned.

ASHHURST, J.—All voluntary donations of the crown are for the honour and service of the State. This seems from the cases mentioned to have been *vexata questio*: but on considering the consequences of this application, it seems more proper that half pay should not be assigned.

BULLER, J.—What the duty of the life-guardsmen mentioned at the bar was originally, we do not know; but for some time past these places have been held regular objects of sale; and if an office may be sold by the party himself, it is assignable for the benefit of his creditors. But that is very different from the present case; for I know of no authority by which an officer may sell his half pay; and on principles of policy he ought not to be permitted to do it. If the question had been whether or not the pay which was *actually due* might be assigned, I should have thought it, like any other existing debt, assignable; but that does not extend to *future accruing payments*.

GROSE, J.—The future half-pay could not have been sold by the defendant himself; and therefore his creditors cannot compel him to assign it for their benefit.

The prisoner was discharged.

A CORRECT

L I S T

OF THE

NEW PARLIAMENT

BEING THE

SEVENTEENTH OF GREAT BRITAIN.

N. B. Where the Elections were contested, the Numbers on the Poll are annexed to the Candidates Names; the Names printed in *Italics* being the unsuccessful Candidates.

1. *Abingdon, Berks.*

Edward Loveden Loveden, esq.

2 *Agmondesham, Bucks.*

Wm. Drake, esq.

Wm. Drake, junior, esq.

3. *St. Albans, Hertfordshire.*

Hon. Richard Bingham.

John Calvert. jun. esq.

4. *Aldborough, Suffolk.*

Viscount Grey.

Thomas Grenville, esq.

5. *Aldborough, Yorkshire.*

John Galley Knight, esq.

Rich. Muilman Chiswell, esq.

6. *Andover, Hants.*

Benjamin Lethieullier, esq.

Wm. Fellows, esq.

7. *Anglesea.*

Hon. William Pagett.

8. *Appley, Westmoreland.*

Richard Ford, esq.

Hon. Banks Jenkinson.

9. *Arundel.*

9. *Arundel, Suffex.*

Sir George Thomas, bart. Henry Howard esq.

10. *Ashburton, Devonshire.*

Robert Mackneth, esq. Lawrence Palk, esq.

11. *Aylesbury, Bucks.*

Scrope Bernard, esq. Gerard Lake, esq.

12. *Banbury, Oxfordshire.*

Lord North, since Earl of Guildford.

13. *Barnstaple, Devonshire.*

John Cleveland, esq. William Denny, esq.

14. *Bath, City of.*

Viscount Weymouth, Viscount Bayham.

15. *Beaumaris.*

Sir Hugh Williams, bart.

16. *Bedfordshire.*

Earl of Upper Ossory, Hon. St. Andrew St. John.

17. *Bedford, Town of.*

William Colhoun, esq. — 616

Samuel Whitbread, jun. esq. — 601

Mr. Payne, — 574

18. *Bedwin, Wilts.*

Marquis Graham, Lord Down.

19. *Beverly, Devonshire.*

John Mitford esq. Sir George Beaumont, bart.

20. *Berkshire.*

George Vansittart esq. Winchcomb H. Hartley, esq.

21. *Berwick, Northumberland.*

Hon. Gen. Vaughan, Hon. Charles Carpenter.

22. *Beverly, Yorkshire.*

John Wharton, esq. — 908

Sir James Pennyman, bart. — 460

Mr. Egerton, — 372

23. *Bewdley, Worcestershire.*

Hon. W. H. Lyuelton,

24. *Bishop & Castle, Shropshire.*

William Clive, esq. Henry Strachey, esq.

25. *Blithningh, Surrey.*

Sir Robert Clayton, bart. Philip French, esq.

26. *Bodryn, Cornwall.*

Sir John Morhead, bart. Roger Wilberham, esq.

27. *Boroughbridge, Yorkshire.*

Sir Richard Sutton, bart. Maurice Robinson, esq.

28. *Bosbury, Cornwall.*

Hon. James Stuart, Humphry Minchin, esq.

29. *Boston, Lincolnshire.*

Sir Peter Burrell, bart. Thomas Fyde, esq.

30. *Brackley, Northamptonshire.*

J. W. Egerton, esq. Samuel Haynes, esq.

31. *Bramber, Sussex.*

Sir Henry Gough Calthorpe, bart. Thomas Coxhead, esq.

32. *Brecon County.*

Sir C. Gould, knt.

33. *Brecon Town.*

Charles Gould, esq.

34. *Bridgenorth, Shropshire.*

Thomas Whitmore, esq. Isaac Hawkins Browne, esq.

35. *Bridgewater, Somersetshire.*

Hon. Vere Poulett, — — 186

John Langton, esq. — — 165

Lord Percival, — — 87

36. *Bridport, Dorsetshire.*

Charles Sturt, esq. James Watson, esq.

37. *Bristol, City.*

Marquis of Worcester, — — 544

Lord Sheffield, — — 137

Mr. Lewis, — — 12

William Cunningham, esq. — — 5

38. *Buck-*

38. *Buckinghamshire.*

Rt. Hon. Will. Wyndham Grenville, Earl of Verney.

39. *Buckingham Town.*

Rt. Hon. James Grenville, George Nugent, esq.

40. *Callington, Cornwall.*

John Call, esq. Paul Orchard, esq.

41. *Calne, Wiltshire.*

Joseph Jekyll, esq. John Morris, esq.

42. *Cambridgeshire.*

Charles Yorke, esq. James Warwood Adeane, esq.

43. *Cambridge University.*

Rt. Hon. William Pitt, — — — 509

Earl of Euston, — — — 483

Lawrence Dundas, esq. — — — 207

44. *Cambridge Town.*

Francis Dickins, esq. Hon Edward Finch.

45. *Camelford, Cornwall.*

James Macpherson, esq. Sir Samuel Hannay, bart.

46. *Canterbury, City.*

George Gipps, esq. Sir John Honeywood, bart.

47. *Cardiff Town.*

Hon. John Stuart.

48. *Cardiganshire.*

Earl of Lisburne.

49. *Cardigan Town.*

John Campbell, esq.

50. *Carlisle City.*

John Clarke Satterthwaite, esq. — 126

Edward Knubley, esq. — 126

— *Curwen, esq.* — — 394— *Bradyll, esq.* — — 39451. *Carmarthenshire.*

Hon. George Talbot Rice.

52. *Carmarthen Town.*

John George Phillips, esq.

53. *Carnarvonshire.*

R. Williams, esq.

54. *Carnarvon Town.*

Lord Paget.

55. *Castle-Rising, Norfolk.*

Charles Boone, esq. Henry Drummond, jun. esq.

56. *Chefbire.*

John Crewe, esq. Sir R. Salusbury, Cotton, bart.

57. *Chester City.*

T. Grosvenor, esq. Viscount Belgrave.

58. *Chichester City.*

Thomas Steele, esq. George White Thomas, esq.

59. *Chippenharn, Wilts.*

James Dawkins, esq. G. Fludyer, esq.

60. *Christchurch, Hampsbire.*

Hans Sloane, esq. George Rose, esq.

61. *Cirencester, Gloucestersbire.*

Lord Apsley, Richard Master, esq.

62. *Clitheroe, Lancashire.*

Sir John Aubrey, bart. Penn Asheton Curzon, esq.

63. *Cockermouth, Cumberland.*

John Anstruther, esq. John Baynes-Garforth, esq.

64. *Colchester, Essex.*

Robert Thornton, esq. — — 822

George Jackson, esq. — — 796

George Tierney, Esq. — — 634

65. *Corff-Castle, Dorsetbire.*

John Bond, jun. esq. Henry Bankes, esq.

66. *Cornwall County.*

Sir William Lemon, bart. Francis Gregor, esq.

67. *Coventry, Warwickbire.*

Lord Eardly, — — 1397

John Wilmot, esq. — — 1393

14th. Willb. Bird, esq. — — 1126

68. *Crick.*

68. *Cricklade, Wiltshire.*

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| Thomas Estcourt, esq. | — | — | 244 |
| John Walker Heneage, esq. | — | — | 194 |
| Samuel Petre, esq. | — | — | 111 |

69. *Cumberland.*

Sir Henry Fletcher, bart. Hump. Senhouse, esq.

70. *Dartmouth, Devonshire.*

Edmund Bastard, esq. Rt. Hon. J. C. Villiers.

71. *Denbighshire.*

Robert Watkin Wynne, esq.

72. *Denbigh Town.*

Richard Myddelton, esq.

73. *Denbighshire.*

Lord G. Cavendish, Edward Miller Mandy, esq.

74. *Derby Town.*

Lord G. A. H. Cavendish, Edward Coke, esq.

75. *Devizes, Wiltshire.*

Rt. Hon. Henry Addington, Joshua Smith, esq.

76. *Devonshire.*

J. Rolle, esq. John Pollexfen Bastard, esq.

77. *Dorsetshire.*

William Morten Pitt, esq. Francis John Browne, esq.

78. *Dorchester, Dorsetshire.*

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|---------------------|---|---|-----|
| Hon. George Damer, | — | — | 103 |
| Francis Fane, Esq. | — | — | 102 |
| Hon. Cropley Afbey, | — | — | 79 |

79. *Dover, Kent.*

| | | | |
|-----------------------|---|---|-----|
| John Trevannion, esq. | — | — | 550 |
| Charles Pybus, esq. | — | — | 701 |
| John Henniker, esq. | — | — | 505 |

80. *Downton, Wiltshire.*

Hon. Bartholomew Bouverie, Sir William Scott, kn.

81. *Droitwich, Worcesterhire.*

Hon. Andrew Foley, Edward Winnington, esq.

82. *Dun-*

82. *Dorset, Suffolk.*

Joshua Vaneck, esq. Barn. Barne, esq.

83. *Durham County.*

R. Burden esq. R. Milbanke, esq.

84. *Durham City.*

John Tempest, esq. William Henry Lambton, esq.

85. *East Looe, Cornwall.*

Hon. William Wesley Pole, Robert Wood, esq.

86. *St. Edmundsbury, Suffolk.*

Sir Charles Davers, bart. Lord Charles Fitzroy.

87. *Essex County.*

Thomas Burney Bramston, esq. John Bullock, esq.

88. *Eversham, Worcestershire.*

| | | | |
|-------------------------|---|---|-----|
| Sir John Rushout, bart. | — | — | 418 |
| Thomas Thompson, esq. | — | — | 407 |
| Mr. Sullivan, | — | — | 374 |

89. *Bolton City.*

| | | | |
|------------------------------|---|---|------|
| James Buller, esq. | — | — | 1106 |
| John Baring, esq. | — | — | 588 |
| Sir Charles Bampfylde, bart. | — | — | 550 |

90. *Eye, Suffolk.*

Richard Burton Phillipson, esq. Hon. Wm. Cornwallis.

91. *Flintshire.*

Sir Roger Mostyn, bart.

92. *Flint Town.*

Watkin Williams, esq.

93. *Fowey, Cornwall.*

By one Indenture.

| | | | |
|------------------------|---|---|----|
| Lord Shuldharn, | — | — | 77 |
| Sir Ralph Payne, | — | — | 76 |
| Philip Rashleigh, esq. | — | — | 69 |
| Viscount Valletort, | — | — | 68 |

By another Indenture.

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|------------------------|---|---|----|
| Philip Rashleigh, esq. | — | — | 75 |
| Viscount Valletort | — | — | 74 |
| Lord Shuldharn, | — | — | 18 |
| Sir Ralph Payne, | — | — | 17 |

94. *Gal-*

94. *Gatton, Surrey.*

John Nesbitt, esq. William Currie, esq.

95. *St. Germain's, Cornwall.*

Marquis of Lorne, Hon. Edw. James Eliot.

96. *Glamorganshire.*

Thomas Wyndham, esq.

97. *Gloucestershire.*

Hon. Geo. Cranfield Berkeley, Thomas Master, esq.

98. *Gloucester City.*

John Webb, esq. John Pitt, esq.

99. *Grampound, Cornwall.*

Thomas Wallace esq. Jeremiah Crutchley, esq.

100. *Grantham, Lincolnshire.*

Francis Cockayne Cull, esq. Geo. Sutton, esq.

101. *Great Grimsby, Lincolnshire.*

John Harrison, esq. Dudley North, esq.

102. *East Grimstead, Suffex.*

Nathaniel Dance, esq. William Nesbit, esq.

103. *Guildford, Surrey.*

Hon. Thomas Onflow, George Sumner, esq.

104. *Hampshire.*

Sir William Heathcote, bart. — — 2013

William Chute, esq. — — 1803

Lord John Russell, — — 1296

J. C. Gervoise, esq. — — 1232

105. *Harwich, Essex.*

John Robinson, esq. Rt. Hon. Tho. Orde.

106. *Haslemere, Surrey.*

Rt. Hon. W. Gerard Hamilton, James Lowther, esq.

107. *Hastings, Suffex.*

Jn. Stanley, esq. Rt. Hon. Sir R. P. Arden, Mast. of Rolls.

108. *Haverford-West, Pembrokehire.*

Lord Kenington.

109. *Helfton, Cornwall.**By one Indenture.*

Sir Gilbert Elliot, bart. Stephen Lushington, esq.

By another Indenture.

James Bland Burges, esq. Charles Abbot, esq.

110. *Herefordshire.*

Rt. Hon. Thomas Hasley, Sir Geo. Cornwall, bart.

111. *Hereford City.*

John Scudamore, esq. James Walwyn, esq.

112. *Hertfordshire.*

| | | | |
|----------------------|---|---|------|
| William Plumer, esq. | — | — | 1827 |
| William Baker, esq. | — | — | 1298 |
| William Hale, esq. | — | — | 1029 |

113. *Hertford Town.*

| | | | |
|--------------------------|---|---|-----|
| John Calvert, esq. | — | — | 319 |
| Nathaniel Dimsdale, esq. | — | — | 294 |
| William Baker, esq. | — | — | 259 |

114. *Hydon, Yorkshire.*

Lionel Darell, esq. Beilby Thomson, esq.

115. *Heytesbury, Wilts.*

William Pierce Ashe A'Court, esq. Lord Auckland.

116. *Higham Ferrers, Northamptonshire.*

Viscount Duncannon.

117. *Hindon, Wilts.*

William Beckford, esq. James Adams, esq.

118. *Honiton, Devonshire.*

Rt. Hon. Sir Geo. Yonge, bart. Geo. Templer, esq.

119. *Horsham, Sussex.*

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|----------------------|---|---|----|
| Timothy Shelly, esq. | — | — | 25 |
| Wilson Braddy, esq. | — | — | 24 |
| Lord William Gordon, | — | — | 20 |
| Mr. Baillie | — | — | 19 |

120. *Huntingdonshire.*

Earl Ludlow. Viscount Hinchinbroke.

LIST OF MEMBERS

121. *Huntingdon Town.*

John Willett Payne, esq. Hon. John Geo. Montagu.

122. *Hythe, Kent.*

Sir Charles Farnaby Radcliffe, bart. Wm. Evelyn, esq.

123. *Ilchester, Somersetshire.*

John Harcourt, esq. Samuel Long, esq.

124. *Ipswich, Suffolk.*

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| Sir John Hadley Doyley, bart. | — | — | 323 |
| Charles Alexander Cricket, esq. | — | — | 312 |
| William Middleton, esq. | — | — | 299 |
| Major Rochford, | — | — | 243 |

125. *St. Ives, Cornwall.*

William Praed, esq. William Mills, esq.

126. *Kent.*

| | | | |
|------------------------------|---|---|------|
| Sir Edward Knatchbull, bart. | — | — | 4196 |
| Filmer Honeywood, esq. | — | — | 2957 |
| Hon. Charles Marsham, | — | — | 2693 |

127. *King's Lynn, Norfolk.*

Hon. Horatio Walpole, Sir Martin Browne Folkes.

128. *Kingston upon Hull, Norfolk.*

Samuel Thornton, esq.

129. *Knareborough, Yorkshire.*

Viscount Duncannon, James Hare, esq.

130. *Lancashire.*

Thomas Stanley, esq. John Blackburne, esq.

131. *Lancaster Town.*

| | | | |
|--------------------------|---|---|------|
| Sir George Warren, K. B. | — | — | 1015 |
| John Dent, esq. | — | — | 1012 |
| Richard Penn, esq. | — | — | 453 |

132. *Launceston, Cornwall.*

Hon. John Rodney, Sir Henry Clinton.

133. *Leicestershire.*

Sir Thomas Cave, bart. William Pochin, esq.

134. *Leicester Town.*

| | | | |
|------------------------------|---|---|-----|
| Thomas Boothby Parkyns, esq. | — | — | 986 |
| Samuel Smith, esq. | — | — | 803 |
| N. B. Halhead, esq. | — | — | 551 |

135. *Leominster, Herefordshire.*

| | | | |
|------------------------|---|---|-----|
| John Hunter, esq. | — | — | 303 |
| John Sawyer, esq. | — | — | 247 |
| Richard Beckford, esq. | — | — | 235 |

136. *Liskeard, Cornwall.*

Hon. Edward James Eliot, Hon. John Eliot.

137. *Lewithiel, Cornwall.*

Viscount Valletort, Reginald Pole Carew, esq.

138. *Lewes, Sussex.*

| | | | |
|--------------------|---|---|-----|
| Hon. Henry Pelham, | — | — | 154 |
| Thomas Kemp, esq. | — | — | 149 |
| Mr. Shelley, jun. | — | — | 88 |

139. *Lincolnshire.*

Charles Anderson Pelham, esq. Sir John Thorold, bart.

140. *Lincoln City.*

| | | | |
|-----------------------------|---|---|-----|
| John Fenton Cawthorne, esq. | — | — | 632 |
| Hon. Robert Hobart, | — | — | 600 |
| Hon. Major Rawden, | — | — | 460 |

141. *Litchfield City.*

Thomas Gilbert, esq. Thomas Anson, esq.

142. *Liverpool, Lancashire.*

| | | | |
|-------------------------|---|---|------|
| Banastre Tarleton, esq. | — | — | 1257 |
| Bamber Gascoyne, esq. | — | — | 889 |
| Lord Penrhyn, | — | — | 719 |

143. *LONDON.*

| | | | |
|-------------------------|---|---|------|
| William Curtis, esq. | — | — | 4346 |
| Brook Watson, esq. | — | — | 4101 |
| Sir Watkin Lewes, knt. | — | — | 3747 |
| John Sawbridge, esq. | — | — | 3586 |
| Nathaniel Newnham, esq. | — | — | 2670 |
| William Pickett, esq. | — | — | 1065 |

144. *Ludlow, Shropshire.*

Lord Clive, Richard Payne Knight, esq.

145. *Luggerball, Wiltshire.*

George Aug. Selwyn, esq. Hon. Will. Asheton

146. *Lyme Regis, Dorsetshire.*

Hon. Henry Fane, Hon. Thomas Fane

147. *Lymington, Havts.*

Harry Burrard, esq. Harry Burrard, esq.

148. *Maidstone, Kent.*

Clement Taylor, esq.

Matthew Bloxham, esq.

Mr. Parker.

149. *Malden, Essex.*

Joseph Holden Strutt, esq. Charles Callis We

150. *Malmesbury, Wilts.*

Paul Benfield, esq. Benj. Bond Hopkin

151. *Malton, Yorkshire.*

Rt. Hon. Edmund Burke, William We

152. *Marlborough, Wilts.*

Earl of Courtown, Hon. Thomas Bruc

153. *Marlow, Bucks.*

Thomas Williams, esq. William Lee Ant

154. *St. Maw's, Cornwall.*

Sir William Young, bart. John Graves Sir

155. *St. Michael, Cornwall.*

David Howell, esq. Christopher Hawkin

156. *Merionethshire.*

Evan Lloyd Vaughan, esq.

157. *Milthurst, Suffex.*

Hon. Percy Ch. Wyndham, Hon. Ch. Wm. V

158. *Middlesex.*

William Mainwaring, esq. George Byo

159. *Milbourne-Port, Somersetshire.*

Lord Muncafter, William Coles Medlyco

160. *Minehead, Somersetshire.*

John Fownes Lutterel, esq. Viscount Parker.

161. *Monmouthshire.*

John Morgan, esq. James Rooke, esq.

162. *Monmouth Town.*

Matquis of Worcester.

163. *Montgomeryshire.*

William Mostyn Owen, esq.

164. *Montgomery Town.*

Whitshed Keene, esq.

165. *Morpeth, Northumberland.*

Sir James Erskine St. Clair, Francis Gregg, esq.

166. *Newark, Nottinghamshire.*

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168. *Newcastle upon Tyne, Northumberland.*

Sir Matthew White Ridley, bart. Charles Brandling, esq.

169. *Newport, Cornwall.*

Viscount Fielding, Charles Rainsford, esq.

170. *Newport, Hants.*

Viscount Palmerston, Viscount Melbourne.

171. *Newton, Lancashire.*

Thomas Peter Leigh, esq. Thomas Brooke, esq.

172. *Newton, Hants.*

John Barrington, esq. Rt. Hon. Sir Rd. Worsley, bart.

173. *Norfolk.*

Sir John Wodehouse, bart. Thomas William Coke, esq.

174. *North-*

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174. *Northallerton, Yorkshire.*

Henry Peirse, esq. Edward Lascelles, esq.

175. *Northamptonshire.*

Thomas Powys, esq. Francis Dickens, esq.

176. *Northampton Town.*

Lord Compton, — — — 822

Hon. Edward Bouverie, — — — 599

Colonel Manners, — — — 265

177. *Northumberland.*

Sir William Middleton, bart. Charles Grey, esq.

178. *Norwich City.*

Hon. Henry Hobart, — — — 1492

Rt. Hon. William Windham, — — — 1371

Sir Thomas Bevor, bart. — — — 656

179. *Nottinghamshire.*

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180. *Nottingham Town.*

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182. *Orford, Suffolk.*

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183. *Oxfordshire.*

Viscount Wenman, Marquis of Blandford.

184. *Oxford City.*

Hon. Peregrine Bertie, Francis Burton, esq.

185. *Oxford University.*

Sir William Dolben, bart. Francis Page, esq.

186. *Pem-*

186. *Pembrokeshire.*

Lord Milford.

187. *Pembroke Town.*

Hugh Barlow, esq.

188. *Pennryn, Cornwall.*

Sir Francis Bassett, bart.

R. Glover, esq.

189. *Peterborough City.*

Richard Benyon, esq.

Hon. L. Damer.

190. *Petersfield, Hants.*

William Joliffe, esq.

Lord North.

191. *Plymouth, Devonshire.*

Alan Gardner, esq.

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Sir Frederick Leman Rogers, bart.

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80

John Macbride, esq.

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192. *Plympton, Devonshire.*

Earl of Carhampton,

Philip Metcalf, esq.

193. *Pontefract, Yorkshire.*

John Smyth, esq.

William Sotheron, jun. esq.

194. *Poole, Dorsetshire.*

Benjamin Lister, esq.

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Hon. Charles Stuart,

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Michael Angelo Taylor, esq.

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Captain Kingmill,

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195. *Portsmouth, Hants.*

Sir Harry Featherstonhaugh, bart.

Hon. Tho. Erskine.

196. *Preston, Lancashire.*

Sir Henry Houghton, bart.

Rt. Hon. Jn. Burgoyne.

197. *Queensborough, Kent.*

Gibbs Crawford, esq.

—

Richard Hopkins, esq.

198. *Radnor County.*

Thomas Johnes, esq.

199. *New Radnor.*

David Murray, esq.

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Edward Lewis, esq.

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| Earl of Lincoln, | Sir John Ingleby, bart. |
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202. *Richmond, Yorksbire.*

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| Earl of Inchinquin, | Lawrence Dundas, esq. |
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203. *Rippon, Yorksbire.*

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| William Laurence, esq. | Sir George Allanson Winn, bart. |
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204. *Rochester, Kent.*

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205. *New Romney, Kent.*

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| Richard Joseph Sullivan, esq. | Sir Elijah Impey, knt. |
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206. *Rutlandsbire.*

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| Gerard Noel Edwards, esq. | John Heathcote, esq. |
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207. *Rye, Suffex.*

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| Charles Long, esq. | Hon. Robert Banks Jenkinson. |
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208. *Ryegate, Surrey.*

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| Hon. John Somers Cocks, | Joseph Sydney Yorke, esq. |
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209. *Salop, Shropshire.*

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| Sir Richard Hill, bart. | John Kynaston, esq. |
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210. *Salisbury, Cornwall.*

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| Edward Bearcroft, esq. | Viscount Garlies. |
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211. *Sandwich, Kent.*

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212. *New Sarum, Wilts.*

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213. *Old Sarum, Wilts.*

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| George Hardinge, esq. | John Sullivan, esq. |
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214. *Scarborough, Yorkshire.*

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215. *Seaford, Suffex.*

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216. *Shaftesbury, Dorsetshire.*

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217. *Shoreham, Suffex.*

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218. *Shrewsbury.*

William Pulteney, esq. John Hill, esq.

219. *Somersetshire.*

Sir John Trevelyan, bart. Edward Phelps, jun. esq.

220. *Southampton Town.*

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| Henry Martin, esq. | — | — | 289 |
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221. *Southwark Borough.*

Henry Thornton, esq. Paul Le Mesurier, esq.

222. *Staffordshire.*

Earl Gower, Sir Edward Littleton, bart.

223. *Stafford Town.*

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224. *Stamford, Lincolnshire.*

Sir George Howard, K. B. Earl of Carysfort.

225. *Steyning, Suffex.*

James Martin Lloyd, esq. Henry Howard, esq.

226. *Stock-*

226. *Stockbridge, Hampshire.*

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| John Scott, esq. | — | — | — | 78 |
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227. *Sudbury, Suffolk.*

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| J. C. Hippisley, esq. | — | — | — | 371 |
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228. *Suffolk.*

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| Sir. T. C. Bunbury, bart. | — | — | 3065 |
| Sir. John Rous, bart. | — | — | 2755 |
| Sir Gerard Vanneck, bart. | — | — | 2047 |

229. *Surrey.*

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| Right Hon. Lord William Russell, | — | 1842 |
| Hon. William Clement Finch, | — | 1373 |
| Sir Joseph Mawbey, bart. | — | 1034 |

230. *Suffex.*

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| Rt. Hon. Thomas Pelham, | Charles Lenox, esq. |
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231. *Tamworth, Staffordshire.*

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| John Courtenay, esq. | Robert Peel, esq. |
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232. *Tavistock, Devonshire.*

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| Rt. Hon. Richard Fitzpatrick, | Hon. Charles Wyndham. |
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233. *Taunton, Somersetshire.*

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| Alexander Popham, esq. | — | — | 257 |
| John Halliday, esq. | — | — | 239 |
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234. *Tewkesbury, Gloucestershire.*

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| Sir William Codrington, bart. | James Martin, esq. |
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235. *Thetford, Norfolk.*

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| Robert John Buxton, esq. | Joseph Randyll Birch, esq. |
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236. *Thirsk, Yorkshire.*

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| Sir Gregory Page Turner, bart. | Robert Vynar, esq. |
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237. *Tiverton, Devonshire.*

Sir John Duntze, bart. Rt. Hon. Dudley Ryder.

238. *Totnes, Devonshire.*

William Powlett Powlett, esq. Francis Buller Yard, esq.

239. *Tregony, Cornwall.*

John Stephenson, esq. Matthew Montagu, esq.

240. *Truro, Cornwall.*

Wm. Aug. Spencer Boscawen, esq. Ja. Gordon, jun. esq.

241. *Wallingford, Berkshire.*

Sir Francis Sykes, bart. Nath. Wm. Wraxall, esq.

242. *Wareham, Dorsetshire.*

Lord Robert Spencer, Richard Smith, esq.

243. *Warwickshire.*

Sir Rob. Lawley, bart. Sir G. Aug. W. Shuckburgh, bart.

244. *Warwick Town.*

Lord Arden, Henry Gage, esq.

245. *Wells City.*

Clement Tudway, esq. Henry Berkeley Portman, esq.

246. *Wendover, Bucks.*

John Barker Church, esq. Hon. Hugh Seymour Conway.

247. *Wenlock, Shropshire.*

Sir Henry Bridgeman, bart. Cecil Forester, esq.

248. *Weobley, Herefordshire.*

Sir John Scott, knt. Viscount Weymouth.

239. *Westbury, Wiltshire.*

Samuel Estwick, esq. Evan Law, esq.

250. *West Loo, Cornwall.*

Sir John William de la Pole, bart. John Pardoe, esq.

251. *Westminster City.*

Rt. Hon. Charles James Fox, — — — 3616

Lord Hood, — — — 3217

John Horne Tooke, esq. — — — 1679

252. *West-*

252. *Westmorland.*

Sir Michael Le Fleming, bart. James Lowther, esq.

253. *Weymouth and Melcombe-Regis.*

Sir James Murray, bart. Richard Bampton Johnstone, esq.

Andrew Stuart, esq. Thomas Jones, esq.

254. *Whitchurch Hampshire.*

Viscount Midleton, Hon. John Thomas Townshend.

255. *Wigan, Lancashire.*

John Cores, esq. Orlando Bridgeman, esq.

256. *Wilton, Wiltshire.*

Lord Herbert, Viscount Fitzwilliam.

257. *Wiltshire.*

Ambrose Goddard, esq. Sir James Tylnay Long, bart.

258. *Winchester, Sussex.*

Viscount Bernard, Richard Barwell, esq.

259. *Winchester City.*

Henry Penton, esq. Richard Gamon, esq.

260. *Windsor, Berkshire.*

Penyston Portlock Powney, esq. Earl of Mornington.

261. *Woodstock, Oxfordshire.*

Sir Hen. Watkin Dashwood, bart. Lord H. J. Spencer.

262. *Worcestershire.*

Hon. Edward Foley, William Lygon, esq.

263. *Worcester City.*

Edmund Wigley, esq. — — — 952

Edmund Lechmere, jun. esq. — — — 892

Samuel Smith, jun. esq. — — — 692

264. *Wotton-Bassett Wiltshire.*

Viscount Downe, John Thomas Stanley, esq.

265. *Chipping-Wycombe, Buckinghamshire.*

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268. *Yorkshire.*

Henry Duncombe, esq. William Wilberforce, esq.

269. *York City.*

Richard Slater Milnes, esq. Sir W. Mordaunt Milne bart.

S C O T L A N D

270. *Aberdeenshire.*

James Ferguson, esq.

271. *Airshire.*

Sir Adam Ferguson, bart.

272. *Argyllshire.*

Lord Frederick Campbell.

273. *Banffshire.*

Sir James Grant, bart.

274. *Berwickshire.*

Patrick Home, esq.

275. *Caithnessshire.*

Sir John Sinclair, bart.

276. *Cromartysire.*

Duncan Davidson, esq.

277. *Dumbartonshire.*

Sir Archibald Edmonstone, bart.

278. *Dumfriesshire.*

Sir Robert Laurie, bart.

279. *Edinburghshire.*

Robert Dundas, esq.

280. *Elginshire.*

Lewis Alexander Grant, jun. esq.

281. *Fife shire.*
W. Wernys, esq.
282. *Forfar shire.*
David Scott, esq.
283. *Haddington shire.*
John Hamilton, esq.
284. *Inverness shire.*
Norman Macleod, esq.
285. *Kincardine shire.*
Robert Barclay, esq.
286. *Kinross shire.*
George Graham, esq.
287. *Kirkcubright Stewartry.*
Alexander Stewart, esq.
288. *Lanark shire.*
Sir James Stewart, bart.
289. *Linlithgow shire.*
Hon. John Hope.
290. *Orkney and Zetland shire.*
John Balfour, esq.
291. *Peebles shire.*
William Montgomery, esq.
292. *Perth shire.*
Hon. James Murray.
293. *Renfrew shire.*
John Shaw Stuart, esq.
294. *Ross shire.*
William Adam, jun. esq.
295. *Roxburgh shire.*
Sir George Douglas, bart.
296. *Selkirk shire.*
Mark Pringle, esq.
297. *Stirling shire.*
Sir T. Dundas, bart.

298. *Sutherlandshire.*

James Grant, esq.

299. *Wigtownshire.*

Andrew M'Dowall, esq.

ROYAL BOROUGHS.

300. *Edinburgh City.*

Rt. Hon. Henry Dundas.

301. *Tain, Dingwall, Dornock, Wick, and Kirkwall.*

Sir Charles Roß, bart.

302. *Fortrose, Inverness, Nairn, and Forres.*

Sir Hector Monro, K. B.

303. *Elgin, Bamff, Cullen, Kintore, and Inverurie.*

Alexander Brodie, esq.

304. *Aberdeen, Aberbrothock, Montrose, Brechin, and Inver-
herve.*

Alexander Callender, esq.

305. *Perth, Dundee, St. Andrews, Forfar, and Cupar.*

George Murray, esq.

306. *Anstruther East and West, Pittenwe, Craill, and Kil-
renny.*

Sir John Anstruther, bart.

307. *Dyfort, Kirkaldy, Bruntisland, and Kinghorn.*

Hon. Charles Hope.

308. *Stirling, Innerkthen, Dumfarnlin, Queensferry, and
Culross.*

Sir Archibald Campbell, K. B.

309. *Glasgow, Dumbaaton, Renfrew, and Rutherglen.*

William Macdowall, esq.

310. *Jedburgh, Haddington, Dunbar, North Berwick, and
Lauder.*

Hon. Thomas Maitland.

311. *Peebles, Lanark, Linlithgow, and Selkirk.*

W. Grieve, esq.

312. *Dum-*

312. *Dumfries, Sanquhar, Kircudbright, Lockmaren, and Annan.*

Patrick Miller, jun. esq.

313. *Wigtown, Whitehorn, New Galloway, and Stanraer*
Nesbit Balfour, esq.

314. *Ayre, Irvine, Rothsay, Inverary, and Cambeltown.*
Hon. Charles Stuart.

Places for which Double Returns are made.

Fowey, Helston, Oakhampton, and Carlisle.

Members returned for two Places.

Bristol and Monmouth.

Marquiss of Worcester.

Bath and Weobly.

Viscount Weymouth.

Knareborough and Higham-Ferrers.

Viscount Duncannon.

Lestwithiel and Fowey.

Viscount Valletort.

Midhurst and Tavisstock.

Hon. Charles Wyndham.

St. Germans and Lifkeard.

Hon. Edward James Eliot.

Appleby and Rye.

Hon. Rob. B. Jenkinson.

Arundel and Steyning.

Hon. Henry Howard.

Westmoreland and Haslemere.

James Lowther, esq.

H A B E T I C A L I N D E X

OF THE
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OF ALL THE
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- I. An Act for indemnifying all persons who have been concerned in advising or executing certain Orders of Council, respecting the Importation and Exportation of Corn and Grain, and also certain Orders issued by the Governor-General of his Majesty's Colonies in America.
- II. An Act for granting a Land-Tax for the Service of 1790.
- III. An Act for granting certain Duties upon Malt, &c. for 1790.
- IV. An Act for taking off the Duties upon unwrought Tin exported beyond the Cape of Good Hope.
- V. An Act for continuing an Act, made in the 23d Year of His Majesty, as far as relates to the rendering the Payment of Creditors more equal and expeditious in Scotland.
- VI. An Act for punishing Mutiny and Desertion.
- VII. An Act for the regulating the Marine Forces while on Shore.
- VIII. An Act to amend Two Acts, made in the 28th of His present Majesty; the One intituled, *An Act for regulating the Trade between His Majesty's Plantations in North America and the West-Indies, and the United States of America; also the Foreign Islands in the West Indies; and the other intituled, An Act to allow the Importation of Rum from the West Indies into the Province of Quebec, without Payment of Duty.*
- IX. An Act for defraying the Charge of the Militia in England, for One Year.
- X. An Act for the better Support of the Dignity of the Speaker of the House of Commons.
- XI. An Act to continue the Laws now in Force for regulating the Trade with Great Britain and the United States of America.

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- XII. An Act to indemnify such Persons as have omitted to qualify themselves for Offices and Employments; and Justices of the Peace, &c. who have omitted to register their Qualifications within the time limited by Law, &c.
- XIII. An Act for appointing New Commissioners of the Land-Tax, together with those named in Two former Acts.
- XIV. An Act for continuing the Reward for finding Longitude at Sea.
- XV. and XVI. An Act for raising a certain Sum by Exchange Bills.
- XVII. An Act for altering the Time appointed for holding certain Sessions and Terms in Scotland.
- XVIII. An Act to continue several Laws relating to the Manufacture of Leather by lowering the Duty upon the Importation of Oak Bark; to the prohibiting the Exportation of Tools in the Iron and Steel Manufacture and to prevent the seducing of Artificers in those Manufactures, to go into Parts beyond the Seas; and to ascertaining the Strength of Spirits by Clarke's Hydrometer.
- XIX. An Act for allowing further Time for Enrolment of Deeds and Wills made by Papists, and for Relief of Protestant Purchasers.
- XX. An Act for rebuilding the Parish Church and Town of St. Thomas, within the City of Bristol.
- XXI. An Act for supplying the City of Norwich with Water.
- XXII. An Act for the Employment of the Poor, in Great Britain and Carlford, in Suffolk.
- XXIII. An Act to continue an Act to let to Farm the Duties on Horses let to hire for travelling Post, and by Turnpike.
- XXIV. An Act for enabling His Majesty to raise the Sum of One Million.
- XXV. An Act for paving the Town of Honiton.
- XXVI. An Act to exempt Goods imported from Yucatan in South America, in Great Britain, from the Duty of Sales, and for allowing a Drawback on Goods exported to Yucatan.
- XXVII. An Act for encouraging new Settlers in His Majesty's Colonies in America.
- XXVIII. An Act for the Importation of Cashew Gum from West India.
- XXIX. An Act for amending an Act for allowing the Importation and Exportation of certain Goods in Jamaica, Grenada, Dominica, and New Providence.

- XXX. An A^ct for granting a certain Sum to be raised by a Lottery.
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- XXXIII. An A^ct to amend several A^cts for regulating the carrying Slaves from Africa.
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- *** XXXV. An A^ct to explain an A^ct, passed in the 20th Year of the Reign of His present Majesty, touching the Election for Knights of the Shire. See Vol. I. p. 521.
- *** XXXVI. An A^ct to explain and amend an A^ct for limiting the Number of Persons to be carried on the Outside of Stage Coaches, or other Carriages. See Vol. I. p. 451.
- XXXVII. An A^ct to continue Two A^cts, made in the 28th and 29th Years of the Reign of His present Majesty, for discontinuing the Duties payable in Scotland upon low Wines and Spirits, and for amending the same.
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- XL. An A^ct to explain and amend an A^ct for repealing the Duties on Tobacco.
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- XLIV. An A^ct to settle a certain Annuity on the Rev. Francis Willis, Doctor of Physick.
- *** XLV. An A^ct for converting certain Annuities, to be attended with the Benefit of Survivorship in Classes, established by an A^ct of the last Session of Parliament, into certain Annuities for an absolute Term of Years, and for enabling the Commissioners of the Treasury to estimate Lives for the Shares so converted.

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- XLVI. An Act for settling a certain Annuity for the Use of the Heirs of William Penn, esq. for Losses sustained in the American War.
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- *** XLIX. An Act to empower Justices to visit Parish Workhouses or Poor Houses. See Vol. I. p. 519.
- L. An Act to continue and amend an Act, for appointing Commissioners to enquire into the State of the Forests and Crown Lands.
- LI. An Act for divesting out of the Crown the Reversion in Fee of the Estate of Sir Roger Strickland, Knt.
- LII. An Act for extending the Navigation of the River Ouse, in Suffex.
- LIII. An Act for putting the Optional Sreets in Westminster under the Management of Parochial Committees.
- LIV. An Act for vesting the Westminster Fish-market in the Marine Society.
- LV. An Act to enable Sir William Hamilton to make and provide Quays, and other Erections, within the Lordship of Hubbertone and Pill, in Pembrokeeshire.
- LVI. An Act to amend an Act for making a Navigable Canal from Cromford Bridge to Langley Bridge, in Derbyshire.
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- XVI. An Act for providing a new Poor House for the Parish of Manchester.
- XVII. An Act for making a Canal from Merthyr Tydfil to Cardiff.
- XVIII. An Act for empowering Persons navigating vessels in the River Ouse, Norfolk, to tow with Horses on the Banks of the said River.

CROWN CASES.

REX v. JACOBS and Others.

Old Bailey February Session, 1784, John Jacobs, Samuel Selfshire, and Richard Macdonald, were tried for a highway-robbery.

It appeared, that when the prisoners were carried before a Justice of the Peace, Samuel Selfshire had been admitted to give evidence against Jacobs and Macdonald, and that they had all made a full confession of their guilt; but neither the information of Selfshire, nor the confession of the other two prisoners, were taken down in writing. The prosecutor attempted to give *vivâ voce* testimony of their confessions.

The Clerk of the Arraignment informed the Court that it had been the constant practice of the Court, that when the Justice has neglected to take a written examination, parole testimony of it may be admitted; but that if he has reduced such examination into writing, no other evidence of it could be received.

MR. JUSTICE GOULD said, The Legislature, by the statutes 1 and 2 *Phil. and Mary*, cap. 13. § 4; and 2 and 3 *Phil. and Mary*, cap. 10, has ordered, "That Justices of Peace, when any prisoner is brought before them on a charge of felony, *shall* take the examination of the said prisoner, and the information of them that bring him, of the fact and circumstances thereof; and the same, or as much thereof as may be necessary to prove the felony, shall be put in writing within two days after the said examination, and certified to the next general Gaol Delivery." The statutes do not leave this matter to the option of the Magistrate, but they say that he *shall* do it; and, whatever may have crept into practice, the directions of this law ought not to be dispensed with. The rule of law is the compass by which the Court ought to be guided. What a prisoner says in other places may undoubtedly be received upon *vivâ voce* testimony; but as the law requires that his examination before the Magistrate shall be reduced into writing, and returned to the Court, the particulars of such examination cannot be given in evidence *vivâ voce*, although in fact such examination never was reduced into writing.

WOOL-

WOOLDRIDGE'S CASE.

Old Bailey February Session, 1784, the prisoner was indicted before Mr Justices Gould and Perring, on the statute of 8 and 9 Will. III. cap. 26, § 6, which enacts, "That whoever shall take, receive, pay or *put off*, any counterfeit milled money, or any milled money whatsoever, unlawfully diminished, and not cut in pieces, at or for a lower rate or value than the same by its denomination doth or shall import, or was coined or counterfeited for, shall be guilty of felony."

It appeared in evidence, that the prisoner had carried a large quantity of counterfeit milled money, of the likeness and similitude of shillings, to the house of a Mrs. Levey, which she agreed to *take and receive* from him, and which he agreed to *pay and put off* to her at the rate of twenty-nine shillings for every guinea. In pursuance of this bargain, the prisoner laid a heap of counterfeit shillings on a table; and Mrs. Levey proceeded to count them out at the rate before-mentioned. She had counted out three parcels, containing eighty-seven counterfeit shillings, for which she was to pay the prisoner three guineas. But before she had paid him, and while the counterfeit money lay thus exposed upon the table, the officers of justice entered the room and apprehended them. Mrs. Levey was admitted an evidence for the Crown; and she swore that she had bought the three parcels of Shillings, and was going to pay the prisoner three guineas for them at the moment they were detected.

It was contended on the part of the prisoner, that the indictment, pursuing the words of the statute, alledged this substantive fact, that the prisoner feloniously did *put off* "the counterfeit money to Elizabeth Levey," but that the evidence did not prove a *putting off*, within the true intent and meaning of the Legislature; for that before the offence could be committed, it was necessary that the contract or agreement to *pay and put off* on the one hand, and to *take and receive* on the other, should be finally completed and ended; which in this case had not taken place, Mrs. Levey not having paid the money to the prisoner.

On the side of the Crown it was contended, that the prisoner having *sold* and given Mrs. Levey *possession* of the counterfeit shillings, it was on his part a completion of the contract;

traff; for he had thereby done every thing that he was enabled to do in "*paying and putting off*," and that it remained intirely with Mrs. Levey to fulfil the subsequent part by *taking and receiving* the counterfeited money which he had so *paid and put off*.

THE COURT.—It is clear beyond a doubt, that the offence charged in this indictment must be measured by the terms of the statute upon which it is founded; and whatever progress the person indicted may have made towards *putting off* the counterfeited coin, if the act of *putting off* is not finally completed, it does not amount to the crime expressed. An ardent wish to abolish an illegal practice is certainly laudable, but Judges must take care that laws, which affect the liberties and lives of their fellow-subjects, are not stretched beyond their true and legal import. The county of York was formerly notorious for the practice of coining, and a general anxiety prevailed to bring every offender to punishment. A man was indicted at the Assizes, before Mr. Justice Gould, for coining a guinea. The impressions, both on the head side of it and the reverse, were perfect and complete. It appeared, however, that the prisoner had delivered it to a person to get it changed, and that, from some awkward roughness upon the edges of it, nobody would take it. The learned Judge from this circumstance conceived, that the treason, though brought very near to a completion, was not quite completed; and the case was referred to the consideration of the TWELVE JUDGES, who were unanimously of opinion, that the offence was not committed. In the present case, the operative words of the Act of Parliament are, "*take, receive, pay, or put off*;" and these words must be construed according to their popular acceptance. Now, is not the common meaning of the expression, "*I have put off such a piece of coin*," that the party has *got rid of it*? Suppose a person, having looked out goods at the shop of a tradesman, is about to pay for them, and while the goods lie packed up upon the counter the tradesman discovers that the money his customer *is paying* is counterfeited; is the money in this case either taken or *received* by the tradesman, or *paid* or *put off* by the customer? Certainly it is not. By this detection the meditated offence is rendered incomplete, and the intention to *pay* and *put off* the money disappointed. It did not reach its effect; it was stopped before it had arrived at the goal. But the Legislature have themselves decided this question; for by a subsequent statute they have provided for the offence which the evidence in this case has proved, *viz.* an uttering and tendering in payment: for it is
enacted

enacted by 15 Geo. II. cap. 28, "That whoever shall knowingly utter or tender in payment any false or counterfeit money, shall suffer six months imprisonment, and find sureties for good behaviour for six months more, &c."

The prisoner was acquitted of this charge; but he was convicted upon another indictment, of having put off a counterfeit half guinea at a lower rate than it denominated: and having been before convicted of a felony, and allowed the Benefit of Clergy, the Counsel for the Crown, on the prisoner's pleading that privilege a second time, filed a counter-plea of record against its being allowed; in consequence of which the prisoner received judgment of death in the September Session following.

SHARPLESS AND GREATRIX'S CASE.

At the Old Bailey, John Sharpless and Samuel Greatrix were convicted, before Mr. Justice Gould, of stealing six pair of silk stockings, the property of Owen Hudson; but a doubt arising whether the offence was not rather a *fraud* than a *felony*, the judgment was respited, and the question referred to the consideration of the Judges upon the following

C A S E.

On the 14th of March, 1772, Samuel Greatrix, in the character of servant to John Sharpless, left a note at the shop of Mr. Owen Hudson, a hosier in Bridge-Street, Westminster, desiring that he would send an assortment of silk stockings to his master's lodgings, at the Red-Lamp in Queen-Square. The hosier took a variety of silk stockings according to the direction. Greatrix opened the door to him, and introduced him into a parlour, where Sharpless was sitting in a dressing gown, his hair just dressed, and rather more powder all over his face than there was any necessity for. Mr. Hudson unfolded his wares, and Sharpless looked out three pair of coloured and three pair of white silk stockings, the price of which Mr. Hudson told him was 14s. a pair. Sharpless then desired Hudson to fetch some silk pieces for breeches, and some black silk stockings with French clocks. Hudson hung the six pair of stockings, which Sharpless had looked out, on the back of a chair, and went home for the other

other goods; but no *positive* agreement had taken place respecting the stockings. During Hudson's absence, Sharpless and Greatrix decamped with the six pair of stockings, which were proved to have been afterwards pawned by Sharpless and one Dunbar, an accomplice in some other transactions of the same kind, for which the prisoners were indicted.

The Judges were of opinion, That the conviction was right; for the whole of the prisoners conduct manifested an original and pre-conceived design to obtain a tortious possession of the property. The verdict of the Jury imports, That in their belief the evil intention preceded the leaving of the goods; but, independent of their verdict, there does not appear a sufficient delivery to change the possession.

DOCTOR DODD'S CASE.

At the Old Bailey in February Session, 1777, William Dodd was indicted on the statute of 2 *Geo.* II. cap. 25, for forging a certain paper writing, *purporting* to be a bond in the penal sum of 8400*l.* and to be signed by the *Earl of Chesterfield* with the name "CHESTERFIELD," and to be sealed and delivered by the said *Earl*: AND ALSO, for forging a certain paper writing, *purporting* to be an acquittance and receipt for money (*to wit*) 4200*l.* and to be signed by the said *Earl of Chesterfield* with the name "CHESTERFIELD."

The indictment consisted of eight counts, charging the prisoner with having knowingly uttered and published as true the said paper writings; and laying the offence to have been committed with an intention to defraud, *first*, the *Earl of Chesterfield*, and *secondly*, Mr. Henry Fletcher.

The names of *William Dodd* and one *Lewis Robertson* were subscribed both to the bond and to the receipt, as attesting witnesses of the signature "CHESTERFIELD." The prosecutors charged them with being equally guilty of the forgery; and from the evidence which was given against them on their examination before the Magistrate, he committed them to Newgate, as principals in the same felony; and bound the *Earl of Chesterfield* and other witnesses in a recognizance to appear against and prosecute both of them as principals in the same degree.

A Bill of Indictment was preferred before the Grand Jury against *William Dodd* only; and the agents for the prosecution obtained an order from the Clerk of the Arraignment
the

the Old Bailey, directed to the Keeper of Newgate, commanding him to carry *Lewis Robertson* before the grand Jury at Hicks's Hall, for the purpose of giving evidence in support of the indictment against *William Dodd*; and by virtue of this order he was removed to Hick's Hall, and examined before the Grand Jury accordingly. The bill was found "*a true bill*;" and the name of *Lewis Robertson* indorsed among others, on the back of it, as a witness for the Crown. On the 21st of February, the Justices of Gaol Delivery at the Old Bailey, being informed of the order which Mr. Deacon had made, and of the transaction which had taken place in consequence of it, made another order, declaring that the order of the 19th of February had been surreptitiously obtained, and that it was *illegal* and *void*.

Doctor Dodd, on being called to arraignment on this indictment, submitted to THE COURT, That as *Lewis Robertson* was in custody under a legal warrant of commitment, as a principal in the offence with which *he* was charged, and, Without having been admitted a witness for the Crown by any legal authority, had been carried before and examined by the Grand Jury, by virtue of a surreptitious and illegal order, the indictment against *him* had been found upon improper evidence, and therefore he ought not to be compelled to plead to it.

It was however ultimately agreed that the trial should proceed; and, on the Jury finding the prisoner GUILTY, the sentence was respited, and this question submitted to the consideration of THE TWELVE JUDGES.

At the next Session, Mr. JUSTICE ASTON delivered the result of their conference to this effect:—"The Judges have met, and have fully considered the whole matter of this objection; and they are unanimously of opinion, That the necessity of some proper authority to carry a witness, who happens to be in custody, before the Grand Jury to give evidence, regards the justification of the Gaoler only; but that no objection lies upon that account in the mouth of the party indicted; for, in respect to him, the finding of the bill is right according to law.

"Whether a private prosecutor, by using an accomplice in or out of custody as a witness, gives such a witness a plea not to be prosecuted, or can entitle the prosecutor himself to have his recognizance discharged, is a matter very fit for consideration, under all the circumstances of the particular case where that question shall arise; but it is a matter in which the party indicted has no concern, nor can he make any legal objection to the producing such a person as a witness,

nels, for the accomplice is against him a legal and a competent witness; and so was *Lewis Robertson* upon the bill of indictment found upon this occasion.

“ The Judges therefore are of opinion, That the proceedings upon that indictment were legal, and that the prisoner was convicted according to law.”

Sentence of death was passed upon the prisoner on the last day of the Session, and he was executed accordingly.

PRIDDLE’S CASE.

William Priddle, Robert Holloway, and Stephen Stephens, were convicted at the Old Bailey in April Session 1787, of CONSPIRACY; and sentenced to pay a fine of 6s.8d each, and to be imprisoned in his Majesty’s gaol of Newgate, viz. William Priddle, for the term of two years; and Robert Holloway and Stephen Stephens, for the term of eighteen months.

During the course of their confinement, George Crofsley against whom they had been convicted of CONSPIRING was indicted at Hicks’s Hall for wilful and corrupt perjury and the indictment being removed into the Court of King’s Bench, came on to be tried before Mr JUSTICE BULLER at the sittings at Westminster after Trinity Term, 1787.

At the trial, William Priddle was produced as a witness on the part of the prosecution; and being examined on the *voir dire*, he acknowledged that he had been convicted of the CONSPIRACY above mentioned, and was then brought up under a *Habeas Corpus* from his confinement for that offence.

It was objected, that a conviction of conspiracy rendered the party infamous, and destroyed his competency as a witness.

MR. JUSTICE BULLER. Conspiracy is a crime of a blacker dye than barratry; and the testimony of a person convicted of barratry has been rejected. It is now settled, that it is the infamy of the crime which destroys the competency and not the nature or mode of punishment. A conviction therefore of any offence which is comprehended under the denomination of *crimen falsi*, destroys the competency of the person convicted, as perjury, forgery by the common law &c.

The testimony of the witness was rejected.

THE
LAWYER'S
AND
MAGISTRATE'S MAGAZINE,

For OCTOBER, 1790.

Adjudged Cases in the Courts at Westminster
in the last Term.

The KING v. the Inhabitants of ERISWELL.

THIS was a case reserved for the opinion of this Court at the Quarter Sessions of the County of Suffolk, which ended as follows:

The pauper, John Sharpe, came into the parish of Icklingham All Saints, in 1767, where he was employed as a day-labourer to work on the navigation: In 1779 he was taken before the Rev. T. Ball, D. D. and Clement Tookie, Clerk, two of his Majesty's Justices of the Peace for the said County, by the Overseers of the Poor of the Parish of Icklingham All Saints, for the purpose of being examined as to the place of his last legal settlement; in consequence of which the following examination was taken upon oath before those two Justices, and signed by the pauper; that is to say, County of Suffolk. The examination of John Sharpe, of Icklingham All Saints in the said county, labourer, taken on oath before us two of his Majesty's Justices of the Peace in and for the said county, the 19th day of February, 1779, touching the place of his last legal settlement.

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"ment; who saith, that about 24 years ago he duly let himself for a year to Thomas Pepper of Eriswell, in the said county, farmer, but cannot recollect his wages; that he duly entered on his said service, served the year in Eriswell as aforesaid, and received his year's wages; since which time he has done no act whereby to gain a settlement elsewhere, to the best of his knowledge. John Sharpe. Taken and sworn before us the day and year first above written." No proceedings were had in consequence of this examination, until the order of removal, which is the subject of this appeal, was applied for and made, but not by the same Justices who took the said examination. The pauper, from the time of the examination being taken, continued to reside in Icklingham All Saints for about five years, endeavouring to gain his livelihood, and without becoming chargeable to that parish, when he became insane, and continued in a state of insanity to the time of his removal to Eriswell, as aforesaid, and also to the time of hearing this appeal. On the part of the respondents this examination was offered in evidence, and objected to on the part of the appellants; but it was received by the Court, the handwriting of the Justices, who took the same, being first proved; and upon that and other evidence, the Sessions confirmed the order; but they also stated that in their opinion the evidence produced, exclusive of the said examination, was not sufficient to warrant that determination.

The question now before the Court was, Whether the examination above stated ought to have been received in evidence; and the Court being divided in their judgment, delivered their opinions at large, the youngest Judge beginning.

GROSE, J.—The question is, whether the information taken before the Magistrate is competent evidence of the pauper's settlement in Eriswell, to warrant the Justices in making the order of removal, and the Court of Quarter-Sessions in confirming it. The fact to be proved was a hiring and service for a year, namely, an agreement between the pauper and T. Pepper, of Eriswell, that the one would serve the Farmer and the other retain the pauper in his service for that period; and that it took effect. To prove this, an examination of the pauper taken before two Magistrates, who did not remove, was produced; and it appeared that the pauper, since his examination, had become insane, and still continued in that state. The objection to this is, that an agreement must be proved either by the parties or the wit-

witnesses to it, and that the oath either of the party or the witness is not admissible in evidence when it is given in the absence of another who is to be affected by it. To this it is answered, first, that this examination may be read, because it is like a judgment upon which no execution has issued. My answer is, that it is not like such a judgment; for, in the first place, before such a judgment can be obtained, the party to be affected by it must have an opportunity of being heard; he must have been served with a writ, or have had notice of the proceedings. And, secondly, the judgment must have been given by a court of competent jurisdiction: but, in the present case, I conceive that these Justices had not jurisdiction to administer an oath. By the 13 & 14 Car. II. they are empowered only to remove; and unless they administer the oath for the purpose of removing, I think it is no more than if a Justice of another county administered it. Here there was no removal, and I do not see what power they had to administer the oath but for that purpose. Secondly, however, it is said that this examination is competent, because it is as good evidence as that of a person who had heard the pauper say that he had been hired for a year, and served it; that such evidence would have been competent, and therefore that this is so. As to its being as good evidence as that of a person who had heard the pauper say he had been hired, there is this material difference, that, had the person been present, such person might have been cross examined as to all that passed between him and the pauper, if any part of it were to be heard. But here we read only what the overseers chose to examine to, and what the Magistrates thought fit to state. Next is such evidence competent? It is what is commonly called *hearsay evidence* of a fact. Now it is a general rule that such evidence is not admissible, except in some few particular cases, where the exception (for aught we know) is as ancient as the rule. A pedigree may be proved by reputation: prescriptive rights may be so proved; and yet in cases of prescription, those very persons, who are permitted to give evidence of what they may have heard from dead persons respecting the reputation of the right, are not permitted to state facts of the exercise of the right which the deceased persons said they had seen. And I am not aware of any principle upon which this evidence is admissible that may not extend to proving by hearsay any agreement whatsoever. No principle was stated to take this out of the general rule, to shew why hearsay evidence of the agreement should be permitted in

this case any more than in any other. But cases have been cited both to prove that this evidence was admissible as hearsay evidence, and as given upon oath before the Magistrates. In *Rex v. Nutley*, two questions were made, 1st, Whether a settlement were proved in Bentworth; and 2dly, Whether a subsequent settlement were gained in Ilstfield. The subsequent settlement was attempted to be proved by Rachael Merratt's hearsay evidence: the Court were of opinion that a good settlement was established in Bentworth; and *Aston, J.* thought the Sessions wrong for rejecting the evidence of R. Merratt, for "the widow's account of her family ought to have been received." The objection therefore was not well considered, and for this reason, that, if it were evidence, it did not prove a settlement in Ilstfield. In *Rex v. Coln St. Aldwin's*, the Court did not declare under what circumstances an examination upon oath would be evidence, but determined that in that case it ought not to have been admitted at all: and the ground upon which Lord Ch. J. *Lee* proceeded, was, that the examination was taken by Justices of another county, and that the person was then alive for aught that appeared to the contrary. The objection, that the two Justices were of another county, was immaterial, if the facts being proved on oath behind the back of the adverse party could be evidence, unless the Court thought the examination must be authorized by the statute; and, if it must, then the objection applies here that the examination is not within it, because the Justices who took the examination did not remove, and possibly they did not think the evidence sufficient to warrant them in making the removal. In *Rex v. Greenwich*, the Court did not determine whether or not the hearsay evidence was competent: the objection does not appear to have been taken; but the Court said that the Sessions had stated evidence, and not facts, and the case was sent down to be re-stated. Undoubtedly, however, an idea has prevailed that such hearsay evidence is sufficient: but I can make no difference between evidence necessary to prove an hiring, that is, an agreement to hire, and any other agreement; the law of evidence must be the same at the Quarter-Sessions as in the Courts of Westminster-Hall; and no one ever conceived that an agreement could be proved by a witness swearing that he heard another say that such an agreement was made. Is the evidence better upon the ground that it was upon oath administered by two Justices? Evidence, though upon oath, to affect an absent person, is incompetent, because he cannot cross-examine; as nothing can be more unjust than that

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a person should be bound by evidence which he is not permitted to hear. Before the statute of *Philip & Mary* (1 & 2 P. & M. cap. 13; and 2 & 3 P. & M. cap. 10), a deposition, taken before the Justice of the county where the murder was committed, was not evidence, even though the party died, or was unable to travel. Why? because, although the Justice had jurisdiction to enquire into the fact, the common law did not permit a person accused to be affected by an examination taken in his absence, because he could not cross-examine; and therefore that statute was made. To this point, the clause in the Mutiny-Act (which authorizes the Magistrates to take the examinations of persons insisting) is strong. It is extremely clear that, if in an action by the executor of the pauper it were necessary to prove this agreement, the affidavit of a witness who was dead, taken before a Judge who was to try the cause, would be incompetent to be read after his death. When then, and upon what principle, could this man's deposition on oath become evidence after his death? No such rule of evidence could exist before the 13 and 14 Car. II. Suppose the case had existed the next year, and the year after the pauper had gone before two Justices and made the oath he did, and after that, upon his death, two other Justices had removed his family upon that examination, could this Court have determined that hearsay evidence of the hiring was good, or that an oath taken before two Magistrates (not for the purpose of removal, in the absence of the other party) would have been good? Or suppose the Act of Parliament had passed two years ago, should we now say it is good? I conceive not; because it would be against the known law of evidence; for, as hearsay evidence, it is hearsay evidence of a fact; and as an examination upon oath, and not in the presence of the opposite party, nor taken with an intent to remove, it is extrajudicial. It at that time it were not admissible, when did it become so? Will the practice of the Justices at their private meetings or at the Quarter-Sessions, make it so? Surely it is too much to say that such a practice shall alter the law of evidence, prevailing throughout the kingdom, in the Courts above and at the Assizes; as Judges of *nisi prius* we do not affect to alter or make new law; how then shall it be competent to Justices of the Peace to do so. But even were we disposed to conform to a rule of evidence adopted by some Justices of the Peace, what are we to say in cases where one Court of Quarter-Sessions, differs from another in their rules? So it is in this case; in some counties they admit this evidence, in others they reject

ject it. We must say that such precedents ought not to guide us, but we must be governed by the known rules of evidence which are to be found in our law books. If then the decisions of the Courts below cannot alter the law, when has it grown into law by the decision of the Courts above? I have commented on the decisions, which were cited in the argument, (the earliest of them being in 1739), and in no one of them has the question fairly and fully come before the Court, or been decided as a principal question. Upon what principle shall it now be decided? None is laid down. But it may be said that it is in this case wise and discreet to depart from the general rule of evidence, and in this instance to admit hearsay evidence of a fact, or evidence on oath administered in the absence of the adverse party. I dread that rules of evidence shall ever depend upon the discretion of Judges; I wish to find the rule laid down, and to abide by it. In this case I find the general rule; I find no decided authority that forms an exception to it; and nothing but a clear uncontrovertible decision upon the point, and not the concession of Counsel, or the *obiter dictum* of a Judge, ought to form an exception to a general rule of law framed in wisdom by our ancestors, and adopted in every case except where the exception is as ancient as the rule. Upon these grounds it seems to me that upon the evidence stated, the Justices below ought not to have removed the pauper, nor the Court of Quarter-Sessions to have affirmed the order; and consequently that both the orders should be quashed.

BULLER, J.—In this case it appears that the pauper was taken before two Justices by the Overseers of the Poor of the Parish of Icklingham, where he then resided, *for the purpose of being examined as to the place of his last legal settlement*; that he was examined on oath before them, and signed his examination. The pauper afterwards became, and has ever since continued, insane; and the Sessions, being of opinion that the examination was good evidence, upon the authority of that, confirmed the order of removal. The question reserved for the opinion of this Court is, Whether under these circumstances the examination ought to have been read in evidence? This case has been argued on two grounds. 1st, that it is admissible, as an examination taken on oath by Justices who had a competent authority; 2dly, that it is evidence, as a declaration under the hand of the pauper. I am of opinion that it is admissible evidence in each of those lights. But before I state the grounds on which I hold it admissible, it will be proper to premise that I con-

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sider the pauper as dead; he being in such a state as renders it impossible to examine him: and, if he were dead, it is admitted at the bar that there are several cases in which it has been held that what he said might be received in evidence. Of those cases I shall take more particular notice when I come to the second part of the case. But the first thing to be considered is, whether this evidence be admissible as an *examination taken on oath by persons having a competent authority*? It seemed to be agreed by those who argued at the bar, that if the Justices had made an order of removal immediately on taking the examination of the pauper, the examination would then have been a judicial act, and would have been evidence; indeed the second section of the act calls it a *judgment*. I agree that if the taking of the examination were not a judicial act, but was merely *coram non judge*, it is not evidence as an *examination on oath*. The question then is, whether this were a judicial act or not? It must be so at the time it was taken, or cannot become so at all; and if an immediate removal might have been founded on it, in my judgment it is a full proof that this was a *judicial act*. The power of the Justices is founded on the 13 & 14 Car. II. cap. 12, § 1, which enacts, That it shall be lawful, upon complaint made by the Overseers of any parish, for any two Justices by their warrant to remove and convey any person likely to become chargeable to such parish where he was last legally settled, unless he give sufficient security for the discharge of the parish, to be allowed by the said Justices. The statute does not in words say any thing about the mode of examination; but wherever a power of judging and determining is given, an authority to examine on oath is virtually and necessarily included in it. Whatever the Justices do in pursuance of that statute, I conceive is judicially done; and unless the rule be general, this absurdity would follow; if the Justices are of opinion, on the examination, that the pauper ought to be removed, and do remove him, it is evidence; but if they are of opinion that the settlement is in the parish requiring the examination, and therefore he ought not to be removed, then it is not evidence; whereas in the latter case, the reasons are much stronger why the examination should be evidence, than in the former; because the parish-officers are present at the examination, and are parties to it, being the complainants, and the persons causing the examination to be taken. But it never can depend on the judgment which the Justices shall form for or against the parish, whether the examinations in the case are or are not evidence; it must be reciprocal.

ciprocal. And this examination, in my judgment, is very similar to the case of a deposition before a Coroner, which has been long settled to be good evidence, 1 *Lev.* 180. *Kel.* 55, though the person accused be not present when it is taken, nor ever heard of till the moment it is produced against him. The Coroner is to inquire into the cause and circumstances of the death of the deceased: the Justices are to inquire to what parish the pauper belongs: both inquiries are general, and no particular persons are parties to them. Again, where depositions are taken before Commissioners of Excise, if the witness die, Lord *Holt* was of opinion that they were good evidence, *Salk.* 555. Where an act is judicially done, it is not necessary that the person to be affected by it should be present in order to make it evidence against him, and therefore depositions taken by a Justice of a person who afterwards died, though taken in the absence of the prisoner, must be read. So it was determined by all the Judges in *Radburne's* case, *Mich.* 1787. It is the same as to depositions taken under a commission from the Court of Exchequer *Tooker v. The Duke of Beaufort*, 1 *Burr.* 146. But an argument was drawn from the Mutiny-Act, which it was said made the depositions evidence in the case of soldiers; and therefore it was inferred from thence, that the depositions were not evidence in any other case. I think that Act affords a very different inference. The first Act, which contains any clause for examining soldiers respecting their settlements, is 16 *Geo.* II. which enacts, That it shall be lawful for two or more Justices of the county or place where any soldier shall be quartered, in case such soldier has either a wife or child, to cause him to be summoned to make oath of the place of his last legal settlement; and such soldier is thereby directed to obey such summons, and to make oath accordingly; and such Justices are required to give an attested copy of such affidavit to the person making the same, to be by him delivered to his commanding officer, in order to be produced when required. Provided, that in case any soldier shall be again summoned to make oath as aforesaid, then on such attested copy of the oath by him formerly taken, being produced, such soldier shall not be obliged to take any other or further oath with regard to his legal settlement, but shall leave a copy of such attested copy of examination, if required. That act says nothing about the examination, or the copy of it, being evidence, but most probably the Legislature meant or understood that they would both be so; for the object was to prevent the soldier being called upon to attend the Justices more than once, and at the

the same time to substitute as good a thing as an examination in lieu of it for the benefit of the parish. But in the 32 Geo. II. or between that time and the 20 Geo. II. the Legislature had under their consideration what would be evidence, and accordingly they inserted in the above clause the following words: "which attested copy shall at any time be admitted in evidence, as to such last legal settlement, before any of his Majesty's Justices of the Peace, or at any General or Quarter Sessions of the peace." So the law stands now; and the copy only, and not the original, is by the Act made evidence; which could only be done on the idea that the original was evidence before. If it had been necessary to have enacted that the original should be evidence, two words would have done it: and it is impossible to suppose that the Legislature meant that the copy should be evidence, when the original was not. This law therefore affords a strong argument that the examination is admissible evidence. - Again, what was said by Lord Chief Justice Lee in the case of the *King v. Colne St. Aldwin's*, is a very material authority to prove that this examination was admissible in evidence. There an order of removal of a bastard made in *Wilts* was founded on the examination of the mother in *Middlesex*. Lee, Ch. J. there said, "the only material evidence which appears to have been given, was the examination of the mother, which ought not to have been admitted; for it is a general rule in evidence that the deposition of a living witness ought not to be received, unless it appear that the witness himself could not be produced to be examined *ore tenus*; and therefore as the evidence here given has an original defect, which cannot be supplied, this order ought to be quashed." It clearly therefore must have been his opinion, that had the mother been dead, or in a state, like this pauper, of incapacity to be examined *ore tenus*, her deposition might have been received in evidence.

The second ground on which this has been argued to be evidence is, that it is a declaration under the hand of the pauper. This introduces the general question, whether *hearsay evidence* from the person under whom the settlement is claimed, can be received. The question has been so often decided, that, in my opinion, it would be sufficient to mention the cases only: but as different opinions are entertained on the Bench upon the subject, I shall go somewhat more at large into the consideration of it. The weight of the authorities was so forcibly felt at the Bar, that the Council, instead of denying that in any case *hearsay evidence*

dence could be received, endeavoured to distinguish the cases determined from the present, and supposed that they were decided on particular circumstances, First, it is said that there is no case in which hearsay evidence has been allowed where the party is alive, and able to be produced. I agree to that position: but here the party is *quæ dead*, and not able to be produced. Secondly, that in the case of *Nutley*, the husband was dead, and there was also personal knowledge of the wife that her husband had been in the service he spoke of. And in the case of *Greenwich*, the husband was dead, and it does not appear but other evidence might have been produced when the case went down to the Sessions again. But let us see what those cases were. In the former, the widow deposed that her late husband *told* her he had hired himself to *Smith*, and that in consequence of the hiring he went into *Smith's* service, and was turned away a month before the year was up, because he should not gain a settlement, though *Smith* did not assign that or any other reason; and the wife further deposed, that she twice saw her husband during the year he served *Smith*. The Sessions, considering the declarations of the husband as mere hearsay, rejected them as not being admissible evidence. It was argued that the case ought to be sent back to the Sessions, to hear and receive the declarations of the husband; that such evidence ought to be admitted in a case circumstanced as the present; and that, in fact, it was the constant practice of other Sessions to receive such hearsay. On the other hand, it was admitted that the evidence of the woman respecting the declarations of the husband, was admissible. And Lord *Mansfield* said, that he was satisfied a clear hiring was proved; and that *though the evidence rejected ought to have been received*, yet it would only produce more litigation and expence, and must have the same effect; he said he thought the order ought to have been quashed. Mr. Justice *Aston* was clearly of the same opinion; and said "to be sure the evidence of the woman ought to have been admitted; but standing alone *ought* to be taken as *inconclusive* [which latter expression must be inaccurately taken; it should have been "ought not to be taken as *conclusive*."] The other case of the *King v. Greenwich*, stated that the pauper was the daughter of *George Wall* deceased, *who in his life-time declared* to a witness now examined, that he had hired himself for a year, and served a year as a livery servant at 7*l.* wages to Captain *Saunderson*, who had a house and family at *Greenwich* and resided there, when not absent on the King's service; that his master made frequent voyages to *Holland*,

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whither he attended him, that he never was 40 days together at *Greenwich*, but during his service might be there 40 days at different times. Afterwards it was more fully stated that he did reside 40 days at *Greenwich* at different times; and the order adjudging the settlement in *Greenwich* was affirmed. Now both these cases are directly in point, and there was no evidence which at all tended to prove a settlement, but hearsay: for in the case of *Nutley*, the wife having seen her husband twice in the service, was no evidence of a hiring for a year; and in the case of *Greenwich* it does appear what passed when the case went down to the Sessions again; for then it was more fully stated that the pauper's father resided 40 days at *Greenwich* at different times; and upon that the order of removal was affirmed on the declaration of the father alone. And when the point was only, whether hearsay evidence could be received, we cannot suppose other evidence, which is not stated, to have been given, which rendered that point immaterial, or varied the effect of it. Thirdly, it was argued that even if the declarations were evidence, yet there must be some concurrent evidence to support it; and this was supposed to have been so held in the case of *Coln St. Aldwin's*: but that case was founded on very clear grounds, and not a word said in it about concurrent evidence, as appears from the note of Mr. Justice *Clive*, which I have before mentioned. Neither does any case whatever say that there must be concurrent evidence. Where the question is, Whether the evidence be admissible or not, it is difficult to conceive what is meant by concurrent evidence; but every case on the subject which at all applies to this point, considers it as clear that the evidence may be received. The two cases of *Nutley* and of *Greenwich* are directly in point; and they are confirmed by those of *Crotch St. Michael*, and of the Inhabitants of the *Holy Trinity* in *Wareham*; in the first of which the pauper having run away, a copy of the Register was proved, and then a witness swore that *John Every*, who was dead, was considered as the pauper's father, and that he knew *Mary Every*, who lived in *P.* and whom he understood to be the pauper's mother, and heard the pauper call her mother: the Sessions held the evidence not to be sufficient, but the Court of King's Bench held that it was. In the case of the *Holy Trinity*, in *Wareham*, it was proved that the pauper's husband was born in *Beer Regis*, and proved by the pauper that her husband was abroad beyond sea, and had been two years, if alive; that to her knowledge he lived in the capacity of an hostler with *Mrs. Lee*, in *Wareham*, about two years, where she saw him brew;

brew; but whether there was any agreement, or hiring, relating to such service, was not proved; but she had *heard* her husband *say* that he was settled in the *Holy Trinity, Wareham*. The Court held that evidence sufficient to prove the settlement: and the reporter of that case subjoins in a note, that in cases where the person under whom the pauper claimed, has been dead, *hearsay evidence from his widow, or from other persons, of his declarations respecting his settlement, have frequently been received*; and instances the cases of *Greenwich* and *Nutley*; but he observed, that, till that case, there had been no instance where the Court had permitted such hearsay evidence to be received in the life of the person under whom the settlement was claimed. The Reporter who has great merit with the profession for his industry and attention on the subject of the poor laws, proceeds to suggest his doubt of the determination of the Court in that case: but, on the best consideration that I can give it, that doubt does not appear to be well founded; for it has long been settled, that if a person be abroad, and not likely to return, or in a state incapable of being examined, he is considered, as to that purpose, as if he were dead. The other cases which were quoted in the argument, do not apply to the present, namely, *Rex v. Great Bedwin*, *Rex v. St. Michael in Bath*, *Rex v. St. Saviour's, Southwark*; and *Rex v. St. Sepulchre*. But it is worthy of observation, that in the case of *Rex v. Nutley*, it is stated on one side to be the constant practice of other Sessions to receive such hearsay evidence, and it is admitted on the other side that the evidence of the widow respecting the declaration of her husband was admissible. So in the note before-mentioned, on the case of the *Holy Trinity* in *Wareham*, it is said that hearsay evidence has been frequently received. If there has been a constant and uniform practice at all the Sessions in the kingdom, I think it requires great consideration before we overturn it; for, besides the great inconvenience, confusion, and inconsistency, which will be introduced by a new determination, we shall hereafter undoubtedly be subject to the same comment and censure as Lord Chief Justice Ryder, in the case of *St. Bishop's*, without *Bishopsgate*, threw on another determination, when he said, "It does not appear in the case of *Stretford v. Norton*, whether these other cases were cited, or what was the particular reason of the resolution: however if they were cited and over-ruled, we may, for the same reason, over-rule that determination." I have inquired what is the usage at different Sessions, and I find that throughout the West of England, in the North of England, and in other

other places, it has been the constant practice to receive such evidence. I have heard of no one Sessions in which a different practice prevails; and if it be in universal use, why should we overturn it? If on such a question arising on a settlement case we are to go into first principles, I know not where we are to stop. It has been understood as pretty clear law, that, in questions of pedigree, and some other cases, *hearsay*, and *reputation*, are good evidence; but if the evidence stated in this case be not allowed, they also will stand on a very shallow and slippery foundation. Each has *authority* to support it; and if that be taken away, I can state no *principle* in favour of them. The true line for courts to adhere to is, that, wherever evidence not on oath has been repeatedly received, and sanctioned by judicial determinations, it shall be allowed: but beyond that, the rule, that no evidence shall be admitted but what is upon oath, shall be observed. It would be easy to state or imagine a conversation in which a man gave an account of his own habits and transactions in life, his residence, his connections, and relations, which would be equally material in tracing a title, as in investigating a question of settlement: and it would be strange if such a conversation, after the father's death, should be sufficient to enable the son to recover an estate of 10,000*l.* a year, and yet should not be sufficient to give his son a settlement as a pauper. Hearsay evidence has been received to prove whether land were or were not, parcel of a certain tenement; and was adjudged to be good evidence in *Davies v. Pierce*, and *Holloway v. Rakes*. It is constantly allowed in all cases of pedigree, though from persons not of the family, as in *Brown v. Shelley*, Easter, 1776; and also in the case of customs; and has been received even in the case of single facts; as of a marriage, being in orders, and of a presentation; *Harfest's case*, Comb. 202; and the Bishop of *Meath v. Lord Belfield*. In the last case, the name of the patron who presented was omitted in the Register, and this Court, on a Writ of Error, held that parole evidence might be received of it; for (said they) a presentation may be by parole, and what commences by parole, may be transmitted to posterity by parole; and that creates a general reputation. A hiring for a year may be by parole; hearsay evidence has been allowed to prove it in all the cases I have mentioned, and has been rejected or denied in none. I am of opinion that those cases ought to be adhered to, and consequently that the order of Sessions should be affirmed.

ASHMURST.

ASHHURST, J.—If this were a new case, I should be strongly of opinion that the evidence given ought not to have been received, as being hearsay evidence. But I think that, as certainty is so desirable in the law in general, and particularly in this branch of it which relates to cases of daily occurrence, when a case has been decided and acted upon, it is better not to overturn it. In the cases of *Rex v. Nutley*, & *Rex v. Greenwich*, which have been stated, and which I shall not repeat, it was determined that such evidence is admissible; and this not as a mere *obiter dictum*, but upon deliberation: and in the latter of them it was thought so material, that the case was sent down to have the fact more explicitly stated; and on its being returned so stated, the order was affirmed here. There are other cases in which this kind of evidence is allowed by universal consent; as in the case of a pedigree; and if we were to overturn the cases which have been determined on settlements, we may as well overturn the law in cases of pedigree; for I do not know any reason which applies to the one, that is not equally applicable to the other. In both, the subject matter of litigation is concerning the state and condition of the party. It is natural for persons to talk of their own situations and of their families. The evidence is in its nature of an unsuspicious kind; it is generally brought from remote times, when no question was depending, or even thought of, and when no purpose would apparently be answered. In these cases, in general, it is perhaps of little consequence to the pauper whether he belong to one parish or to another; the dispute is between the two parishes which should bear the burden of maintaining him. The pauper himself (when capable of being produced) is competent to give evidence relative to his settlement. In the two cases alluded to, it was held that, when he is dead, his declarations may be received in evidence; and the being in a state of insanity (which introduces the same impossibility of producing him as if he were dead) makes the evidence equally admissible. With regard to the statute 13 & 14 Car. II. it rather seems to me that on that ground also this evidence is admissible. We are not to suppose that the party was taken before the Justices, and examined upon oath before them, as a matter of mere idle curiosity; nor can we imagine that the Justices would have interfered in it merely to gratify such curiosity. We must take it therefore that the thing passed in the way of a judicial proceeding; and though for some reason, it happened that the examination was not acted

acted upon, we cannot but suppose that, at the time, it was taken as the foundation of an order of removal. At all events this renders the declaration of greater solemnity than an idle declaration in the course of common conversation. As this matter has been already so fully gone into by my brother *Buller*, with whose sentiments I entirely concur, I shall not add more than that I agree with him in thinking that the orders ought to be affirmed.

LORD KENYON, Ch. J.—As far as the interests of these contending parties are concerned, I might excuse myself from entering into a discussion of this question; for, as two of my brothers have already declared their opinions against making the rule absolute, it cannot be made so, as my opinion added to that of my brother *Grose's*, will not make a majority. But as this is a matter of importance, I should feel myself liable to great reproach, if I were to suffer this question to pass, without declaring my opinion. All questions upon the rules of evidence are of vast importance to all orders and degrees of men; our lives, our liberty, and our property, are all concerned in the support of these rules, which have been matured by the wisdom of ages, and are now revered from their antiquity, and the good sense in which they are founded; they are not rules depending on technical refinements, but upon good sense; and the preservation of them is the first duty of Judges. The evidence should be given *under the sanction of an oath legally administered, and in a judicial proceeding depending between the parties affected by it, or those who stand in privity of estate or interest with them.* I admit that this man who was proved to be insane, is to be considered as to this purpose in the same state as if he were dead; and it has been decided that in such cases the party's hand-writing may be proved, as if he were actually dead. Then it is said, that there are two grounds on which his examination may be received, as to both of which I agree with my brother *Grose*. 1st, As an examination taken upon oath before two Justices of the Peace, who, it is argued, had authority to take it. 2dly, As a declaration of the party examined. I will briefly consider both these positions. The first depends on the statute 23 & 24 Car. II. That statute empowers the Justices to make an order of removal; it does not give them an express power to examine, but, as an examination is necessary to get at the facts upon which the judgment of the Magistrate is to proceed, there is an incidental power given, allowing them to examine when they are called upon to exert their power of removal. But in this case they were not ap-
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plied to for the purpose of making an order of removal; the Overseers called upon them for no other purpose than to examine the pauper; all the proceedings therefore were extrajudicial; and the examination on oath might just as well have been taken before the Parish Clerk, and would have been as much entitled to credit as this. But I will go further; if this examination had been taken in order to found an order of removal upon it, still I should have been of opinion that it would be no better, as far as respects the present question, than a mere declaration of the party, the effect of which I shall consider presently. Examinations upon oath, except in the excepted cases, are of no avail unless they are made in a cause or proceeding depending between the parties to be affected by them, and where each has an opportunity of cross-examining the witness; otherwise it is *res inter alios acta*, and not to be received. It has been said that this is a judgment of the Justices, as appears by the 2d section of the 13 and 14 Car. II. which has the word *judgement* in it; and that it is no objection to its being a valid judgment that the parties to be affected were not present. But I think the word *judgment*, in the section referred to, is only used as equivalent to the word *opinion*. And as to a judgment being binding, though the party to be affected was not present, I think it will scarcely be found that that is so, unless in case where the party has had an opportunity of being present, or was contumacious, neither of which was the case with the parish now to be affected; but as to them, it was altogether *res inter alios acta*. It has been said that there are cases where examinations are admitted, namely, before the Coroner, and before Magistrates in cases of felony. That observation appears to me to go rather in support of the general rule, than in destruction of it. Every exception that can be accounted for, is so much a confirmation of the rule, that it has become a maxim, *exceptio probat regulam*. Those exceptions alluded to, are founded on the statutes of *Philip & Mary*; and that they go no further, is abundantly proved. Besides, the examination before the Coroner is an inquest of office; it is a transaction of notoriety, to which every person has a right of access; and writs of *ad quod damnum* have been frequently set aside for want of this notoriety in the execution of them by the Sheriff. But, without stating the cases which occur on this head, I will do little more than to refer to the case of *The King v. Paine*, in *Salk.* 281. & *5 Mod.* 163. That was not loosely decided, but was the opinion of this Court, assisted by the Court of Common Pleas,

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In *Saikiel* it is expressly said, that the rule cannot be extended further than the particular case of felony: and, in the other book, the Chief Justice declared, that the depositions were not evidence; and a weighty reason is given, namely, "the defendant not being present when they were taken before the Mayor, and so had lost the benefit of a cross-examination." This case is adopted in 2 *Hawk. Pl. C. cap. 46*, § 1. 10, which, with the subsequent sections of that chapter, are worth consulting.

Secondly, considering this as a declaration of the party, I am at a loss to find the grounds on which it can be received. I admit that declarations of the members of a family, and perhaps of others living in habits of intimacy with them, are received in evidence as to *pedigrees*; but evidence of what a mere stranger has said, has ever been rejected in such cases. That however has been always understood to be an excepted case, and to stand on reasons peculiar to itself, which I need not take up time by stating. If the exception go further, I should have wished to have heard it stated and defined; for unless that is done, I am much afraid we may endanger a rule of infinite importance to every individual, and, by suffering exceptions to creep on one after another, leave nothing like a rule. It has been said, that in the case of *The Bishop of Meath v. Lord Belfield*, in a *quare impedit*, the plaintiff gave in evidence an entry in the register of the diocese of the institution of one *Knight*, in which there was a blank in the place where the patron's name is usually inserted; upon which parole evidence of the general reputation of the country, that *Knight* was in by the presentation of one under whom Lord *Belfield* claimed, was offered; and that, upon a bill of exceptions, it was held that the evidence was admissible; that it was said that a presentation may be by parole, and what commences by parole, may be transmitted to posterity by parole. I have not seen the report of that case: but this I admit, that a presentation may be by parole, and that may be proved by parole; that is, by a witness who was present and heard it; but that common reputation might be given in evidence, I must deny; if it could, why might not such evidence decide upon titles to estates, at least before the statute of frauds, when no written instrument was required to make a good feoffment of the greatest landed property in the kingdom. In short, it being admitted that the rule for which I contend is undoubtedly the general rule, the evidence offered in this case must be rejected, unless an exception in favour of it has been adopted in such a manner as to incorporate it into the law of evidence. For where is the

line to be drawn? If the Court admit such an examination to be evidence against a class of persons who are strangers to it, how shall we stop short, and say, that it shall not be evidence against any other? I cannot say how far such an idea might go. This brings me to the cases cited, and to the supposed usage. And, as to the first, there is no one case in which the point has been decided. In *Rex v. Nutley*, the whole of the wife's evidence was disregarded; whereas a fair inference might be drawn to prove her husband's settlement, from the facts which she swore to within her own knowledge; for every hiring is presumed to be for a year, unless something is stated to prevent that inference; and therefore the Court quashed the order of Sessions on that ground. As to the case of *Greenwich*, the Sessions, the second time, found the *actual fact of the service* for 40 days in the parish. Then, as to the case of *St. Sepulchre*, the only point there determined by the Court, was, that they could not receive parole evidence of an indenture not proved to be lost. And in that of *The Holy Trinity in Wareham*, enough appeared from the facts, which the wife spoke to from her own knowledge, to lead the Court to support the conclusion which the Sessions had drawn. There is therefore no case in which this point was the very hinge on which it turned. But even if there had, as it would have stood single in opposition to a series of cases, I should not have placed much reliance on the super-structure, when the foundation failed. But the observations I have made upon the cases alluded to I think warrant me in saying, that though there were some expressions tending to shew that such evidence might be received, yet it was not the *ground of decision* in any of them; they amounted only to *obiter dicta*; or even let them be called *solemniter dicta*; and, at least, they seemed to have proceeded on a supposed general usage at the Quarter Sessions. This therefore brings me to that which was the last topic of argument. The proposition which is stated is this, that the Justices of Peace in Sessions, having in general received such evidence as this, their usage creates a rule by which we are to proceed. I have great respect for that class of magistrates; I know their most important utility; and have much regard for many of them individually; but I confess there is something of novelty in that argument which refers those whom the constitution of the jurisprudence of this country hath invested with the power of correcting the errors of Justices of the Peace to the practice of those very persons to learn the rules of evidence by which they are to proceed. I remember a case of *Baldwin et ux. v. Blackmore*, which

which is reported in 1 *Burr.* 525, and of which I have a MS. note, and a full memory; where Justices of the Peace had committed a man and his wife for returning to a parish from whence they had been removed by an order. The action was brought by the husband and wife, on the ground that the wife had been improperly committed; the case was twice argued; and the usage of committing *femes covert* was insisted upon; and it rather appeared at first that some part of the Bench were inclined to give countenance to such an usage; but I well remember that Mr Justice *Foster* treated the argument with more indignation than is expressed by Sir *James Burrow* in his account of that case. I perfectly well recollect that learned Judge's saying that he had heard that *communis error facit jus*, but he hoped he should never hear that rule insisted upon, to set up a misconception of the law in destruction of the law. I should have disdained to say any thing on this position, unless it had received the appearance of some countenance in the cases I have mentioned, and in the discussion of this case. It is the whole ground of the opinions hinted at in the other cases. But I could give some account of the usage during the many years I practised at the Sessions, and I confess I never heard of such evidence being received there. The practice I know varies according to the usage of each county where the Sessions are held; and I should as soon resort to the usage of every parish in the kingdom on a question concerning the rateability of personal estate. But I will not enter more into this point, as I am clear it would be most dangerous to adopt it. The mistakes of Judges, provided they became universal, would, according to that doctrine, become rules of law. An usage, commencing at soonest since 13 & 14 *Car.* II. contrary to law, and working injustice every day it was persisted in, would supersede the law. Upon the whole, I am most clearly of opinion that this examination was not admissible in evidence. It was *ex parte*, obtained at the instance of those Overseers whose parish was to be benefited by it, and behind the backs of the parish against whom it has now been used, without having an opportunity of knowing what was going on, or attending to have the benefit of a cross-examination. I regard the question as of the last importance, and as putting in danger the Law of Evidence, in which every man in the kingdom is deeply concerned.

The Court being equally divided in opinion,

The order of the Justices remained undisturbed.

GOOD v. ELLIOTT.

The defendant betted the plaintiff five guineas, that one Susannah Tye had bought a certain waggon of David Coleman, and they deposited 1*l*. each in the hands of a third person, and agreed that the wager should be determined by the declarations of Tye and Coleman.

An action was brought to recover the wager, which it was allowed the defendant had lost, and at the trial a verdict was given for the plaintiff.

Now upon a motion in Arrest of Judgment, it was argued that this wager was illegal and void, and that no action could be maintained upon it; and that it was also prohibited by 14 *Geo.* III. cap. 48.

GROSE, J.—The ground of the motion in Arrest of Judgment is, that all wagers are illegal, where the party has no other interest in the subject matter of them than that which he chooses to create by his bet. In thus stating the proposition, it seems admitted that some wagers are legal; and indeed it cannot, after the different authorities which have been decided, be doubted. *Andrews v. Heme*, (1 *Lev.* 33), and *Walcott v. Tappin*, (1 *Keb.* 56), are in point. Those cases were on a wager of 20*l.* to 20*l.* whether *Charles Stuart* would be King of *England* within twelve months then next following; which, upon a motion in Arrest of Judgment, was held good. It is true that that was not the objection there insisted upon, but those who objected would undoubtedly have made it, if it could have been supposed to have any foundation. But actions on wagers have been innumerable; and, as to this point, what was said by Lord *Mansfield* in the case of *Da Costa v. Jones* (*Corw.* 729), is decisive. It is there laid down that wagers are not void *quâ* wagers; and that the restraints imposed on certain species of wagers by Acts of Parliament, are exceptions to the general rule, and prove it. It has been argued, however, that they are void as gaming contracts, and therefore against sound policy: if they were, the 14 *Geo.* III. cap. 48, would have been unnecessary; neither would there have been any occasion for the elaborate opinion delivered by Lord *Mansfield* in *Da Costa v. Jones*, in which he took
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much pains to state the particular ground on which that wager was void. It would have been enough to have said that it was a gaming contract, and therefore void. On that ground, every declaration of a wager would have been demurrable to; and there would have been an end of this species of action which we have so repeatedly heard of. Lord *Mansfield* indeed in that case lamented that wagers were not void as gaming contracts. Every wager, I admit, is not legal, and the grounds on which they may be void, are fully stated by Lord *Mansfield*, in *Da Costa v. Jones*; such as a wager which would be an incitement to a breach of the peace, or to immorality, or one that would affect the feelings or interests of a third person, or expose him to ridicule, or libel him: and the reason he gives is, because they are not only injurious to a third person, but disturb the peace of society; and he might have added, what was said in *Atherfold v. Beard*, (2 *East*. 610), that those also are void which are against sound policy. We may then take the rule to be that those wagers are bad, which by injuring a third person, disturb the peace of society, or which militate against the morality or sound policy of the kingdom. Then has this bet any such tendency? It is a bet concerning a waggon then lately belonging to David Coleman, that *Susannah Tye* had bought it before the bet was made; which was to be decided by David Coleman and *Susannah Tye*. Now it does not appear to me that such a bet is an injury to any one but the loser; or that it disturbs the peace of society; or that it is against morality or sound policy. It may be said, that it *may* involve a question, Whether *Susannah Tye* stole it; but it does not necessarily involve that question; and therefore, after verdict, we are to presume that it did not. It would be strange to presume that it did, when upon the face of the first count the bet is to be decided by her and Coleman. Then can it be said that the wager is void, because it respects the interest of a third person? I cannot say so; because I find no such rule laid down in *Da Costa v. Jones*. Lord *Mansfield*, it is true, amongst wagers not to be permitted, classes those which affect the interest of third persons; but why? because they are not only an injury to a third person, but disturb the peace of society. And indeed in most of the wagers that have been laid, the interests of third persons have been in some degree involved. Upon that ground, the wager in 1 *Lev*. 33. might have been held bad. I therefore think that the declaration is supportable at common law. But it hath been argued, that since the 14 *Geo*. III. every wager of this sort

is void. Now the case of *Da Costa v. Jones* was since that statute, and yet this objection did not occur either to the Counsel who argued against the wager, or to Lord *Mansfield*. That was "An Act for regulating insurance upon lives, and for prohibiting all such insurances, except in cases where the persons insuring shall have an interest in the life or death of the person insured." The preamble states, that inconveniences had arisen from the making insurance on lives, or other events, wherein the party had no interest, and for remedy enacts that no insurance shall be made on lives, or any other event, wherein the person on whose account such policy shall be made, shall have no interest, or by way of gaming, or wagering; and avoids every assurance made contrary thereto. If the Legislature had intended to make all wagers void, it is extraordinary that the statute did not enact "that all and every wager and wagers upon any event in which the person making the wager, shall have no interest, shall be void." It has been said indeed, that such is the meaning of the words, "by way of gaming, or wagering." But to put such meaning on those words, would, in my opinion, be to torture the plain sense of plain words. The statute evidently meant that every insurance on lives, or on any event, in which the assured has not an interest, shall be void, whether such insurance be effected in the form of a policy, or by way of gaming or wagering. And if the construction contended for by the defendant be the true one, it leads to this extraordinary proposition, that a statute which concerns every part of the community, and was passed in 1774, has never been understood by any one till 1790. To say that every wager is prohibited by this statute, is to say that every wager is an insurance, and that the Parliament intended to describe a wager by calling it an insurance; which, I am of opinion, was not their intent. If it were, they have used a number of unnecessary words to render obscure what a few words could have made plain and obvious to the meanest capacity. For these reasons I think that every wager is not void, either at common law, or by the above statute; that this wager is neither an incitement to a breach of the peace, or any immorality; that it neither exposes to ridicule, or libels any one: nor does it so affect the feelings or interest of any one, as to cause any injury to him, or disturb the peace of society. And that after the cases which have been determined, to say that this action cannot be maintained, would be to make law, and not to interpret it. Therefore I am of
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opinion that the rule for arresting the judgment, ought to be discharged.

BULLER, J.—This is an action upon a wager laid between the plaintiff and the defendant, whether Susannah Tye had bought a waggon. A motion has been made in Arrest of judgment, upon the ground that such a wager is illegal and void, and that therefore no action can be maintained upon it. The case has been argued on two grounds; 1st, That it is void at common law; 2dly, That it is void by the statute 14 Geo. III. cap. 48. The opinion which I hold on the first point, would very well excuse me from discussing the question made on the statute: but as that point has been agitated before, and perhaps may be so again, I will deliver my sentiments upon both the questions. For the plaintiff, it has been insisted that it is now too late to discuss the question, Whether wagers in general are lawful or not? and an expression of Lord Mansfield's in *Du Costa v. Jones*, has been relied on, wherein he says, "Whether it would have been better policy to have treated all wagers originally as gaming contracts, and so have held them void, is now too late to discuss; they have too long and too often been held good and valid contracts." With great deference to that very high and respectable authority, I doubt whether it be too late to consider that question or not; for, in *Bruce v. Rose*, Dom. Proc. 14th April, 1788, a decree in Scotland was affirmed, on the ground that all idle wagers were void. In the printed cases, which is all we have to go upon, it is stated that the rule and principle of the civil law relative to the *sponsiones ludicæ* were early adopted as common law in that kingdom, and have been constantly adhered to. And the great and laudable pains, which on all occasions have been taken to preserve an uniformity between the laws of that country and this, make that case of considerable authority here. The opinions of Ld. Ch. J. Holt, in *Brewster v. Kidgell*, and of Lord Hardwicke, in *Cox v. Philips*, go a great way to support the same doctrine; and they rightly draw the line between feigned issues to try a real right, and idle wagers between persons who have no interest. If actions on wagers were constantly allowed in those days, I think Ld. Ch. J. Holt would hardly have said, that he would not have tried the action had he not thought that the issue had been directed by the Court of Chancery; and yet in the particular case I think he was mistaken, because that action was brought to try a real right. In the case quoted by my brother Grose of a wager, whether Charles Stewart would be King of England, I presume no one will say that

an action could now be maintained on any bet of that kind. Till the case of *Da Costa v. Jones*, the question was never agitated, or the mischievous consequences of sustaining such actions discussed. But however the question on wagers in general may stand, I think there is a clear legal objection to this wager; and that I am supported by the opinions of Lord *Hardwicke* and Lord *Mansfield*, in laying it down as a certain rule of law, that no two men, by means of a voluntary wager between themselves, shall be permitted to try any question upon the right or interest of a third person: In the case of *Cox v. Philips*, Lord *Hardwicke* said, "Mr. *Muilman* is particularly concerned to complain to the Court; for though the verdict, if it had passed against him, could not have been given in evidence against him, not being party to the suit, yet it is a prejudice to a man to have the report of a verdict that he is married in this way." And yet let the marriage in that case have been decided in any way, it could not have involved Mr. *Muilman* in any crime or act of immorality: he might have been entitled to great pity, but that was all. In the case of *Da Costa v. Jones*, immediately after the passage above alluded to, which was quoted by the plaintiff's Counsel, Lord *Mansfield* says, "Notwithstanding wagers have been so generally entertained, there must be a variety of instances where the voluntary act of two indifferent parties, by laying a wager, shall not be permitted to form a ground for an action, or a judicial proceeding in a Court of Justice." His Lordship then put cases of a wager on a criminal act, or an immoral act; and afterwards he said, "to come nearer to the point; suppose a wager that affects the interest or the feelings of a third person, for instance, that such a woman has committed adultery, would a Court of Justice try the adultery in an action on such a wager? or a wager that an unmarried woman had a bastard, would you try that? would it be endured? most unquestionably it would not: because it is not only an injury to a third person, but it disturbs the peace of society; and in either of these last two cases, the party to be affected by it would have a right to say, *how dare you to bring my name in question*." Afterwards he said, "Third persons, merely for the purpose of laying a wager, shall not thus wantonly expose others to ridicule, and libel them under the form of an action." It is not material whether in fact evidence be given to disgrace or affect a third person; but if by possibility that may be the case, it is an objection to the action. We are now upon a motion in arrest of judgment,

ment, and therefore can only look at the record to see what might have been proved upon it. Suppose evidence had been offered that the woman had stolen the waggon, would it not have been pertinent to the issue? Suppose it were proved that there was a mistake in casting up an account which this woman had settled, and by that means the waggon remained unpaid for; might it not be the cause of another action against her? Suppose it were proved that the waggon was worth 20*l.* but that she bought it for 4*l.* when the owner was drunk, would she not be disgraced by it? If a man of high rank were to sell a horse at Newmarket to a person just 21 years of age, for 5000*l.* whatever the laws of Newmarket may justify, it would not be a pleasant thing to have it discussed in a Court of Justice, whether the horse were worth more than 25*l.* If it appear on the record, that the bet is founded on the *private transactions, or the interest of a third person*, I think it is void. I take it to be agreed by all my brethren, with whom I have the misfortune to differ, that if the wager concern the interest of the public, or impute a crime or disgrace to another person, it is void, and cannot be made the subject of an action. The question then is, Whether there be any found difference between a wager throwing an imputation on another, and a wager which respects his property only; I can find none. But, on the contrary, I go further; for I hold that though the wager imputes no crime or disgrace to another, and though it do not call in question any pecuniary interest of another; yet *if it concern the person of another, no action can be maintained upon it.* And therefore I am of opinion that a bet on a lady's age, or whether she has a mole on her face, is void. No third person has a right to make it a subject of discussion in a court of justice, whether she passes herself in the world as being more in the bloom of youth than she really is, or whether, what is apparent in her face to every one who sees her is a mole or a wart: and yet these are circumstances which cannot in a court of law be stated as an injury; for it a man say that a young woman who passes for 23 years of age is 33, or that she has a wart in her face, (which is considered as a nasty thing), no action will lie for it. I will put one case more, which, if it do not appear too ludicrous, perhaps may be found to bear upon the present question. Suppose a bet were made whether a young lady squinted with her right eye or her left eye; shall it be the subject of sober enquiry in a court of Justice how the organs of her eyes are formed, and which of them it is that looks directly

to the object before her? Shall the parties in the action be permitted to say, the enquiry is no injury to her, for every body sees that she squints, and it makes no difference to her whether it be with one eye or the other? No. The answer is, you the plaintiff and defendant have no right by an idle wanton bet of yours to bring her person or even her name in question. The principle of the cases, in which it has been said that a bet respecting a third person is void, is not because it occasions a temporal loss to that third person, or because it subjects him to punishment, but because the laws of the country are calculated only to try adverse rights, and not to indulge or entertain the impertinent inquiries of others, upon matters in which they are in no wise interested. What is it to the plaintiff or the defendant, whether this woman bought the waggon, or stole it, or whether she has paid for it, or is insolvent, and never can pay for it. If it be permitted to these parties to try whether this woman owes 4*l.* for the waggon to the former owner of it, the necessary consequence is that any two men may try all the debts, the circumstances, and the solvency of another, which will afford a ready mean of making men in trade bankrupts before their time. If it appear on the face of the record that the interest of the public, or of an individual, is materially affected, the proper way of taking advantage of the objection is by demurrer, or by motion in arrest of judgment. *Da Costa v. Jones*, and *Atherford v. Beard*, are express authorities upon this point; and by them it is established, that if the action lead to *improper inquiries*, it may be stopped *in limine*. The case of *Atherford v. Beard* can be supported on no other grounds; for in that case there was a confession by the defendant that he had lost the wager, and therefore it was unnecessary, and indeed it was not attempted, to unravel or examine any accounts respecting the public revenue. But where the inquiry affects the character or interests of an individual, justice can only be done by stopping it at the outset; for if the parties are permitted by their counsel to tell their own story at large in public, it is a very feeble and inadequate mode of protecting the character of the person traduced, for the Court to say we cannot receive evidence of what has been stated, or, after the mischief has been done, to say it should not have been done. By the very statement of the case, the busy curiosity, and the foolish rattle of the world are set in motion; and it is beyond the reach of human jurisprudence afterwards to efface its effects. Let us adhere then to the case of *Da Costa v. Jones*,
and

and much mischief will be prevented, no inconvenience can arise. The wisdom of that determination convinced the mind of every man who heard or who has read it; and I can find no reason for departing from it in one instance more than in another, in which it is said that the action cannot be maintained. One case in which it is determined that the action will not lie, is where the bet affects the *interest* or the *feelings* of a third person. I subscribe to both the propositions. The interest or the feelings of a third person may both be involved in this inquiry; but if it affect her *interest* only, that decides against the plaintiff. And when we speak of the *feelings* of others, I know of no line to go by, but whether the matter at all concern the *person* or *transactions* of another. Men's feelings are as different as their faces; one man will exult in having made a sharpening bargain, when another would blush at the mention of it: but the craft of the one, or the remorse of the other, are not to be put to the test by an action on an idle wager between other persons.

Upon the second question I can say very little more than what I expressed in *Atherfold v. Beard*, namely, that either the courts must restrain the 14 Geo. III. cap. 48, to such cases as in form are policies, which would go a great way towards repealing the statute, or, by pursuing the spirit of the act, they must extend it to all wagers where the parties have no interest. A gaming policy is a *wager*, and so was considered by the Legislature itself, and by the majority of the Judges in *Foster v. Thackery*. In the 7 Anne, an act passed which was entitled an act to prevent laying *wagers* relating to the public; and, to prevent that, it is enacted that all *policies* relative to the war shall be void. The 14 Geo. III. cap. 48, is entitled an act for regulating insurances for *lives*, and for prohibiting all such insurances, except in cases where the persons insuring shall have an interest in the life or death of the person insured. The title of the Act is confined to insurances on *lives*; but the enacting clause extends to *all other events* where the parties have no interest, *or by way of gaming or wagering*. The present is the case of a *wager*, where the parties have no interest: and the only question to be made is, whether the act shall be confined to what is in form a *policy*. If it be, every mischievous kind of gaming which the statute complains of, may still prevail under the sanction of law, by altering the words only of the agreement, and letting the substance remain; or, in other words, a man shall be permitted to do that indirectly, which

which he is forbid to do directly. The case of *Foster v. Thackery*, was not finally determined; but still I think it is a case of considerable authority. Lord *Mansfield* said, "what is a policy? It is derived from a French word, which means a *promise*. Is a particular form necessary? must it begin "In the name of God, Amen," or refer to Lombard Street? A *mercantile* policy we all know; but a *gaming policy* is a mere *wager*. If the form were essential under the act, it may be evaded immediately; for it may begin, "we promise; it war be declared, we will pay, &c." Apply that to mercantile events, "we promise to pay if the ship sails, and does not arrive, &c." This case most certainly is within all the mischief and inconvenience intended to be prevented by the act. That case, however, was never finally decided; but it is well known that a great majority of the Judges were of opinion against the action. The construction which I put upon the act is, that it has nothing to do with what in the true sense and meaning of the word is a *policy*, that is, a mercantile policy made on interest; but that it prohibits *all wagers* made on any event in which the parties have not an interest. Upon the whole, I am of opinion that the judgment ought to be arrested.

ASHMURST, J.--The question is, whether the plaintiff can retain his verdict either on *general grounds*, or from the *particular circumstances* of the *wager*. As to the general ground, namely, whether an action will lie on *any* wager, that question does not now appear open to argument; it having been settled by so many authorities, both ancient and modern, and particularly in the case of *Da Costa v. Jones*, where Lord *Mansfield*, though he expressed a strong wish that the practice of laying wagers could be abolished, said, "that in different *wagers* upon indifferent matters, without interest to either of the parties, *are certainly allowed* by the law of this country in so far as they have not been restrained by any particular act of parliament; and the restraints imposed in particular cases, support the general rule." And it is to be observed that this case was subsequent to the statute against gaming and wager policies, or insurances. I think therefore I may now take it as a settled law that *all* wagers are not illegal, since that point has been determined by so recent a case supported by ancient authorities. The subject matter of the wager itself may in many instances render wagers illegal; as if they be against *public policy*, against *decency*, or tending to affect the *particular interests of individuals*. The two first of these clearly have nothing to do with

with the present question, and therefore I shall pass them over. And the latter of them does not, in my opinion, apply more; for we must remember that we are now deciding on a case which comes before the Court on a motion in arrest of judgment, and therefore no objection can be taken but what arises upon the face of the record. If (though it do not appear on the record) it had been proved at the trial that Coleman's waggon had, in fact, been lately stolen from him, it might have been said that the discussing of this question might naturally lead to the investigation whether Susannah Tye might not have been concerned in stealing it; but that ought to have been made a ground of objection at the trial by way of non-suiting the plaintiff, and cannot be taken advantage of in arrest of judgment. This point was intimated by Lord *Manfield* in the case of *Da Costa v. Jones*, where (as he thought that some of the matters proved in evidence, tended more strongly to prove how the interest of the Chevalier D'Eon was affected than any thing that appeared on the record,) he directed the defendant's counsel also to move for a new trial, that he might have the chance of that advantage, as well as that of the indecency of the question in case the defendant should not succeed on that point. This manifestly shews Lord *Manfield's* opinion, that a wager is not illegal, because, by some possible supposition, which ingenuity might devise, it might affect the interest of a third person, but, in order to make it illegal, it must appear that such circumstances did actually exist, which must necessarily or naturally tend to affect the interest of a third person. But no such circumstance appears in the present case; it does not appear that any waggon had ever been stolen from Coleman; nor does any one circumstance appear which can make this more than a plain simple matter of fact, and nothing is to be presumed that does not appear. As to the statute 14 Geo. III. cap. 48, I think it cannot be made to apply to all wagers in general, without doing the greatest violence to the construction of it. The grievance recited in the act, is the making mercantile transactions, and transactions of business, a cloak for gaming; it therefore forbids the making of policies on lives, or other events, in which the party has no interest; and it enacts that no policy shall be made without inserting the names of the persons interested, and for whose benefit the policy is underwritten; and the same may be said of all the other provisions. But no member of either of the houses of parliament, who concurred in passing that act, ever thought that

a wager

a wager was a policy. I perfectly agree that all wagers are foolish things; it is throwing away the money of the party, and trifling with the time of Judges and Juries to them to determine such questions; and I wish that the law were abolished. But where any public grievance or inconvenience exists, not provided for by law, it of right belongs to the Legislature, by our constitution to remedy such grievance, and it would be dangerous, if courts of justice were to assume such a power. The Legislature, I am satisfied, has not done it in this instance, and we must put the execution till it is altered. Therefore I am of opinion that the rule to arrest the judgment ought to be discharged.

LORD KENYON, Ch. J.—I have not entertained any doubt upon this question from the time when it was first brought down to the present moment. I entirely agree with what was said by Lord Mansfield in *Da Costa v. Jones*, that the law has gone to an extent which is much to be complained of, and if we were sitting here in a legislative capacity, perhaps we should be prudent to declare that no wagers whatever should be allowed; but it is our duty *jus dicere*, not *jus dare*; we can only pronounce what the law is; and if there is a defect in it, the Legislature alone is competent to amend it. Now in order to know what the law has said upon this subject, let us trace it back, and it will be found that from the earliest times, the books all speak the same language. Before the time of Lord Holt, it was a question whether *indebitatus assumpsit* would lie for a wager, and I agree that it would not; but, says Lord Holt, (*Cartwright v. Cartwright*) though the action does not lie in that particular form, yet an action formed on the wager itself, and laid by mutual promises, might be maintained. In some cases in which such an action has been supported, the matter in dispute has not only been the most trivial thing that could be imagined, but it also respected third persons, as in the case of a wager whether one of the players at backgammon would move a man (*Salk. 344*). In the case of *Earl of Sandwich v. Pigot* (*Burr. 2802*), though the wager was in itself somewhat indecorous, there was no doubt either at the Bench, or at the Bar, but that the action was maintainable. From the earliest times therefore down to the case of *Da Costa v. Jones*, there appears to have been no doubt upon the subject; and I desire to be considered as assenting to those cases to the extent they have gone. Any objection arising from the admission of indecent wagers, or actions on some sort of wagers, in cases of defect

often necessary to go into evidence respecting the sexes, and many questions must arise where the most indecent evidence is permitted whenever it is necessary for the attainment of facts to promote the ends of justice; in such cases it is our duty to admit it, however our feelings may be affected by the discussion. I wish not to be understood to contradict any thing that may have been said in *Da Costa v. Jones*, and the other cases; but, at the same time, let me avail myself of what Lord Mansfield there said, that "in different wagers upon indifferent matters, without interest to either of the parties, are allowed by the law of this country, so far as they have not been restrained by particular acts of parliament; and the restraints imposed in particular cases, support the general rule." And it is clear that the case of *Da Costa v. Jones* was never argued upon the ground, that no action on a wager would lie, but only that *that case* formed an exception to the general rule. The case of *Bruce v. Rofs*, 14th of April, 1788, in the House of Lords, proceeded on a distinction between the law of Scotland and that of England; and it was argued on the ground that the civil law was adopted in that country, and governed the decisions of their Courts. And there are many cases in the House of Lords, where they are bound to decide contrary to the law of England; as in the case of death-bed dispositions of property in Scotland, in which, though the law of that country is different from ours, that Court are as much bound to adhere to it, as the Council at the Cockpit is bound to adopt the laws of Jamaica or Barbadoes in appeals from those islands to the King in Council. I have looked into most of the books of the civil law on this subject, which by no means prohibits wagers in general. It would favour a little of pedantry to cite passages from them, therefore I will only mention a distinction taken by Vinnius, which is, that wagers respecting Cæsar are allowed, unless they affect the character of Cæsar, &c. Now what is there in the present case, that can affect the character of the woman who had bought the waggon; nothing of that sort appears upon the record, and we can make no inference. The question is, whether the waggon was the property of A. or B. and they are to decide it. What is there at common law to make such a wager bad? If not, how is it affected by the statute law. All the statutes respecting gaming are so far parliamentary declarations that wagers and gaming had been lawful. The 16 Car. II. cap. 7, § 3, in vacating contracts for money lost at play, and money betted on those

those who play, affords another parliamentary inference that such wagers were allowed before the statute. I remember a case in *Wiffen*, where an action was brought on a bet of 14 guineas to 8 on a horse-race: there the Court held that, as the plaintiff might under the statute 9 *Ann.* and 16 *Car. II.* have refused to pay the 14 guineas if he had lost, there was no mutuality in the wager, and therefore he could not recover the 8 guineas of the defendant. But had the wager been within the limits allowed by the statutes, there is no doubt but that it would have been held good. So in the case of a man running against time, (2 *Wiff.* 36). My opinion proceeds on this ground, that being bound by former decisions, not having the power to alter the law, not finding any one case against the legality of wagers in general, and finding cases, without number, wherein wagers have been held to be good, and that the payment of them may be enforced, I think the wager in the present case good at common law. Then as to the second point, namely, whether the wager is void by the statute 14 *Geo. II.* I cannot but think that that act of parliament relates wholly to *policies of insurance*: and, as my brother *Grave* has said, it would be strangely distorting the meaning of words to suppose that such a wager as the present could be within the meaning of the Legislature; for, from the words used in the second clause, it is apparent that they had *written instruments* only in contemplation, by requiring the names of the parties interested, to be inserted therein. It seems to me extremely clear, that the act was meant to be confined to policies of insurance. I should be glad to go as far as I could to put a stop to the mischief arising from this species of gambling by wagers, but that would be, in my opinion, to make law; and those mischiefs therefore must be left to the correction of the Legislature, whenever they think proper to apply a remedy.

Rule discharged.

POMERY v. PARTINGTON, *Executor of M. GRYLLS.*

This was an action of covenant tried at the *Launceston* Assizes before Baron Perryn, where a verdict was found for the plaintiff subject to the opinion of this Court.

C A S E.

By an indenture, dated 3d of January, 1764, M. Grylls, in consideration of 30*l.* demised to J. Pomery a moiety of tithes in St. Nyot, Cornwall, for 99 years, if the plaintiff should so long live, to commence at the deaths of J. Pomery and E. Carlyon, at the yearly rent of 19*s.* and a heriot of 40*s.* on the death of the plaintiff, he dying tenant in possession. The lease contained a covenant by M. Grylls, warranting title to Pomery. J. Pomery and E. Carlyon died, on which the plaintiff became possessed of the moiety of the tithes. One C. Grylls, being seised in fee of the moiety of the said tithes, by will dated the 23d of April, 1726, devised all his manors, messuages, lands, tenements, and hereditaments, with their appurtenances, to his wife Mary Grylls for life, remainder to trustees to the use of William Grylls for life, remainder to the use of R. Grylls, the eldest son of William, for life, remainder to the use of his first and other sons, &c. in tail-male, remainder to the use of M. Grylls (the lessor), second son of W. Grylls, for life, remainder to the use of his first and other sons in tail-male, remainder to the devisor's own right heirs. That the devisor declared his intent to be that, notwithstanding any use or estate therein limited, it should and might be lawful to and for the said W. Grylls for and during the term of his natural life, and afterwards to and for all and every other person or persons to whom the lands and premises aforesaid should, by virtue of the limitations aforesaid, come and descend, as the same should happen, at his and their wills and pleasure, from time to time, and at all times, by any deed or deeds indented, under their hands and seals respectively, to grant, demise, and lease all or any of the said manors, parts of manors, messuages, lands, tenements, and hereditaments, to any person or persons whomsoever, for 1, 2, or 3 life or lives, or for the term of 99 years,

years, to be determinable on the deaths of 1, 2, or 3 persons, either in possession, or reversion; usual rents, and other yearly payments, dues, services, and heriots be from time to time reserved and made and payable yearly to such person and persons, to the next and immediate reversion and inheritance of the premises should, by virtue of the limitations and uses before mentioned, from time to time appertain and and so as there should not be, at any one time, any or larger estate upon any *one tenement*, or part of a tenement so leased, demised, and granted, than for 3 lives, or 99 years, determinable on the deaths of 1, 2, or 3 persons, either in possession or reversion; and so lease or leases should not be made dispunishable of. After the decease of Charles Grylls, the said Mary, V. and Robert Grylls were successively seised of the several respective estates above devised to them; and R. Grylls so seised, on the 29th of September, 1742, made demise of the premises in the above indenture, made for 99 years, determinable (as is therein mentioned) on the deaths of J. Pomery and Elizabeth Carlyon. R. Grylls afterwards died, without issue of his body; whereupon the said Matthew Grylls became seised of the right of the moiety of the said tithes for the term of his life, the remainder thereof belonging in the manner in the above will limited, and being so seised, demised the same to the said J. Pomery, in manner above set forth during the term therein, died without issue male or female body. W. Grylls had no other sons besides the said Robert and Matthew; but, after the death of Matthew Grylls, Richard Gervys Grylls, claiming title to the said tithes as right heir of Charles Grylls the deviser, he being the grandson of Gervys Grylls, the brother of Charles Grylls, brought an ejectment against the present plaintiff for recovery of the moiety of the said tithes, inasmuch as the said Matthew had not good and sufficient right, to grant and demise the same, according to the form and effect of the above lease; and, in Michaelmas Term 1741, obtained a judgment against the present plaintiff for recovery thereof, who was thereupon ejected. The cause was stated, that Charles Grylls was, at the time of making the said will, seised in fee of the moiety of the said tithes of certain manors, lands, tenements, and hereditaments devised in the manner stated in the declaration. The indenture of demise, on which the action is brought, and the counterpart thereof, were duly executed, &c. Mary

liam, Robert, and Matthew, Grylls, in the will mentioned, were respectively seised of the said tithes, and died, as in the declaration stated, before the demise in the declaration in the ejectment therein mentioned. Robert and Matthew died without issue male; and William had no other son, besides the said Robert and Matthew. At the time of making the lease, on which this action was brought, there was no subsisting lease of the tithes, except the lease mentioned in the declaration, dated the 29th of September, 1742. Richard Gervys Grylls, the grandson, being the right heir of the devisor, obtained a verdict in the ejectment on the 25th of July 1785; and, in the following term, signed judgment, and sued out his writ of *habere facias possessionem*, which was duly executed. At the time of making the will of Charles Grylls, part of the premises thereby devised in the manner stated in the declaration, and not comprised in the lease on which this action is brought, had been usually demised, reserving rents, and other yearly payments, dues, reservations, and heriots: but *the moiety of the said tithes was never leased before the making of the will of Charles Grylls.* The present defendants had notice of the ejectment brought by the said R. Gervys Grylls on the 11th day of July, 1785: that cause was tried at Bodmin on the 25th of the same month, and a verdict found for the lessor of the plaintiff. It was proved at the trial of this cause that the value of the moiety of the said tithes was 30*l. per annum*; and it was contended on the part of the plaintiff, that the mode of estimating the damage sustained by him, if he were intitled to recover, was to ascertain the value of the interest, in the said term, contained in the indenture, on which the action is brought, at the time of the death of Matthew Grylls, and to add to the amount thereof the costs of defending the ejectment, by which mode of estimation of the damages, the same amount to 500*l.* On the part of the defendants it was insisted that the plaintiff was only intitled to recover the sum of 30*l.* being the fine paid on the making of the lease, the interest thereof calculated to the time of the judgment, and the costs of defending the ejectment, which sums amount to 125*l. 17 s. 2 d.*

LORD KENYON, Ch. J.—When I first read over this case, I confess I entertained no doubt upon the question; but when *Comberford's case* (2 *Rol. Abr.* 262, 15,) was stated at the Bar, I wished to see on what ground the Court proceeded in determining it. For if certain legal ideas be annexed

to certain technical words, as in the case of limitations in real estates, it would be extremely dangerous to depart from the sense given to them by the law, however apparent the intention of the parties might be to the contrary. Now looking into that case, the rule will be found to be clear and undoubted: but the Counsel, who argued *Goodtitle v. Fumcan*, in stating *Comberford's* case, omitted the most important words, namely, that the intention of the parties was to govern. If that be the rule, and the Judges in construing the particular words of different powers have appeared to make contradictory decisions at different times, it is not that they have denied the general rule; but because some of them have erred in the application of the general rule to the particular case before them. For in all the cases they profess to determine upon the intention of the parties.

It is not necessary to go into all the cases which have been cited because they are all arranged in *Dougl.* 554, and the direction given to them by Lord *Mansfield*; from all which I at last extract the general rule, that the construction of these powers must be governed by the intention of the parties. And in applying that rule to the case of *Baggot v. Oughton*, he said, "in a family settlement of an estate, consisting of some ground always occupied together with the seat, and of lands let to tenants upon rents reserved, the qualification annexed to the power of leasing, that the ancient rent must be reserved, manifestly excludes the mansion-house, and lands about it, never let. No man could intend to authorize a tenant for life to deprive the representative of the family of the use of the mansion-house. The words in such a case shew that the power is meant to extend only to what has been usually let. By that means the heir enjoys the premises in the settlement, just as they were held by his ancestor, the tenant for life: he has the occupation of what was always occupied, and the rent of what was always let." Now the whole of this reasoning applies most pointedly to the case before us. These tithes never have been let but have always been occupied by the possessor of the estate. Therefore I do not think that the case of *Baggot v. Oughton* can be distinguished from this in principle. That case afterwards went to the House of Lords, though I do not find it in *Bro. Parl. Cases* *. This is the broad ground on which I am of opinion that the lease in question is not

* It appears from a note in 8 Mod. 381, that this judgment was affirmed in the House of Lords.

valid one. There are indeed other grounds upon which tithes might be laid to shew that this was the intention of the devisor, if it were necessary to have recourse to them. In the enumeration of the property to be leased, every particular mentioned is a corporeal hereditament; the word "hereditament" is indeed sufficiently comprehensive, in its general signification, to include tithes; but the other words, which accompany it, shew the sense in which it is to be taken here. Another circumstance is, that the leases are not to be dispunishable of waste; a provision which could not apply to tithes. But I do not wish to rely on these small circumstances, my opinion being founded on the general intention of the party, which is fairly to be collected from the other part of the case. For it is inconceivable that the devisor intended, under the power of leasing, to give authority to reduce the value of the tithes from 30*l.* to 19*s.* a-year. And indeed, according to the defendant's arguments, the lease would have been equally good if no rent at all had been reserved. As the lease in question therefore is not warranted by the power, it is void.

ASHHURST, J.—The principle on which this case must be determined, was clearly illustrated by Lord *Mansfield* in *Gudkile v. Fumcan*, when he examined the grounds of the different decisions: and indeed his opinion is so full and explicit, that it is not necessary to repeat the grounds of it here. But the inference from them all is, that the intention of the parties is to govern the construction of the power. Now here the manifest intention of the devisor was, that nothing should be demised but that which had been letten before; these tithes therefore could not be leased, because the usual rent could not be reserved, they never having been let before. Perhaps the devisor had this reason for imposing such a restriction on the tenant in possession, that, if no rent had been before reserved for some part of the premises, there could be no guide for the future rent; and therefore the tenant, for the sake of an immediate advantage to himself, might otherwise have made a beneficial lease, reserving only a nominal rent.

BULLER, J.—The single point to be considered is the intention of the devisor. Now, in my opinion, the nature of the property alone is sufficient to decide the question. This gentleman had an estate of a considerable value, part of which was in his own occupation, and the rest was held by lease: that was the way in which he occupied his property; and he intended that those who enjoyed his estate

afterwards, should enjoy it in the same manner. The part of Lord *Mansfield's* judgment in the case of *Goodtitle v Fumcan*, which has just been read by my Lord, seems to be a judgment formed for this very case. For it is a reasoning on the case where part of the estate is enjoyed in possession, and part on lease; which Lord *Mansfield* considers so clear as not to admit of a doubt. In all the cases which Lord *Mansfield* examined, the intention of the parties was the only point to be considered. The misfortune in *Cumbersford's* case was, that the Court relied on two words, *ita quod*, of little or no signification in themselves, but which were thought to have a technical construction. In *Walk v. Wakeman*, those words received a similar construction, though manifestly against Lord *Hale's* opinion. In the case of *Baggot v. Oughton*, the Court got rid of the words *ita quod*; for though the restriction in that case was to let at such yearly rents or more as the same were then let at, yet they were the same in substance. And in *Goodtitle v Fumcan*, which was twice argued, it was said by one of the Counsel at the Bar, that there was no difference whether the power were to lease reserving the ancient rent, or *ita quod* the ancient rent be reserved; and the Court were of the same opinion. And the determination of that case proceeded on the intention of the parties. There Lord *Mansfield* said the intention was apparent from the words of the power, and the nature of the property. Now from what was the intention collected? First, from the express power to demise the manor and fishery, which distinguishes that case from the present, that shewed that it never could have been intended to annul the restriction, of reserving the usual rent, to the demise of the manor, because it had never been let before; next, from the value of the manor, which was merely nominal; and 3dly, from the smallness of the fishery, which was worth only 15*s. per annum*, and had been let once before, though it was not in the lease at the time of the settlement; from whence the intent was concluded to be, that the party might let all the premises, reserving as much rent in the whole as had been reserved before. That was a harsh attempt by a young nobleman to set aside the whole lease, on account of the trivial article of the fishery, which none of the parties to the settlement ever understood was meant to be excepted out of the power of leasing. In that case, too, the Court relied on the words at the end of the power "or proportionably for any part thereof," though no notice is taken of it in the printed report. For those words shew

shewed that it was the intention of the parties that the quantum of the rent, and not any particular part of the premises included in the settlement, was to guide the person in executing the power. But in this case the devisor did not intend that any part of the estate should be let, but that which had been usually demised before.

GROSE, J.—This has been very properly considered as a question of intention; and the intention of the devisor clearly appears to have been this, that such parts of the estate as had been before leased, should continue to be granted on lease, reserving the usual rents, but that those parts, which had never been before demised, should not be let. Now it appears by the case, that the lands had been let before, but not the tithes; and consequently this lease of the tithes cannot be supported. There is another expression, besides those which have been already commented on by the Court, which shews that this was the devisor's intent; for part of the restriction was "that there should not be at any one time any greater estate upon any one *tenement*, or part of a tenement so leased, than for three lives, or 99 years." Now though the word "*tenement*," in its general sense may include *tithes*, yet it is clear that it was not so used in this power. On the former argument, my doubt arose on *Comberford's* case; and even there the Court professed to decide on the intention of the parties. And though I differ with them in the construction of the words there used, yet I agree with the principle upon which that case was determined. I also agree with Lord *Mansfield's* opinion, in his comment on the case of *Baggot v. Oughton*, which applies forcibly to the present case.

Postea to the plaintiff.

OGDEN v. FOLLIOT, in Error.

This was an action upon a bond brought in the Court of Common Pleas, upon which the Court gave judgment for the plaintiff; whereupon the defendant brought this Writ of Error.

C A S E.

The defendant, together with R. and L. Morris, gave bond, dated New-York, October, 1769, for 4000*l.* currency; at the time of making the bond, the plaintiff and R. Morris, and the defendant, resided within the United States of America, and continued so till after October, 1777. The sum of money being then due and unpaid, and the plaintiff then residing at New-York, by a law of the State of New-York, he was *ipso facto* attainted of the offence of adhering to the enemies of the said State of New-York, and all his estate both real and personal, in October, 1779, was forfeited to the people of New-York; which said law still is in full force and effect. The defendant was bound only as a surety for the said R. and L. Morris, he being, at the said time, resident in the State of New Jersey, and in possession of real and personal property more than sufficient to pay the said sum of 4000*l.* and his other debts. On the 2d of January 1779, he was attainted, according to the laws of New Jersey, and all his estate, real and personal, was forfeited to the said State of New Jersey for ever; but liable to the payment of all his debts, and all other demands against him. In September, 1783, by the definitive treaty of peace and friendship, made between his Majesty and the States of America, his Majesty acknowledged the said States, to be independent States, and treated with them, as such; and by the said treaty the several laws which had been made and passed, by the Legislatures of the said respective States, after their declaration of independence, for the confiscation of the property of persons within the said respective States, were recognized and admitted to be valid. The question was, Whether these Acts passed in North America after the Declaration of Independence, and before the treaty of Peace, were valid in the Courts of Law in this Country?

LORD KENYON, Ch. J.—This question is undoubtedly of considerable moment, inasmuch as it affects an extensive class of persons, and inasmuch as the argument has involved in it the respective rights of the subjects of the different nations: however, the ground on which I am inclined to confirm the judgment given by the Court of Common Pleas, seems perfectly clear. And indeed we all considered it so clear in the last term, that we did not think it proper that the question should be discussed. Whether or not the report of what passed in the Court of Common Pleas in this case be accurate, I will not presume to say: but I confess I was induced to think that the word “not” had been omitted in that part of the judgment, where the acts of the State of New-York passed during the war, are considered “to be of as full validity as the act of any independent State.” For supposing that the language, as reported to have been used by that Court, had in fact been used, and that the case was to be determined on that ground, I should have wished to have heard it once argued in answer to the objection made by the plaintiff in error. If we were to consider the acts of the province of New-York as binding, as has been contended, I am at a loss to know why all the property of those persons, which was said to be confiscated, did not pass to the executive power of that State to whom it is said to be forfeited; and why an action might not have been brought in the name of such executive power to enforce the payment of this bond; and how an action could have been brought in the name of the obligee. Having said thus much on the judgment supposed to have been given by the Court of Common Pleas, I can only say that at present I cannot assent to the reasoning on which that Court gave judgment, though I am of opinion that it should be affirmed on different grounds. The court of Common Pleas, in giving judgment, stopped at the plea: but the judgment, which I am prepared to give, is founded on the whole of the pleadings, which are in substance these: the plea states that the province of New-York, in 1779, at the time when the confiscatory law passed, was part of the dependencies of Great Britain in open rebellion against the King, and that the plaintiff and the defendant were resident in that State; what became of them afterwards does not appear: and it is not alledged that they were resident in, or subject to the laws of that State, when the treaty of peace was signed. It is not necessary to say what effect that would have had; but thus it stands: in 1779 that province set about a reform, and to assert what is called their rights,

but

but which I, sitting here, am bound to say was an act of rebellion against the sovereign power of the State, and that their act was illegal at that time, whatever confirmation it might afterwards receive there by the subsequent treaty of peace. Then, when these parties came into this country before the independence of America was acknowledged, was their property confiscated? Could it have been pleaded here to an action brought *at that time*, that those States had made what they called a law, forfeiting the property of those who adhered to the government of this country? Certainly not. And yet as between these parties, they must be understood to be in the same situation now as at that time; for, whatever operation the treaty of peace might have on the persons resident in that country, it is impossible to say that it was intended to, or did, give effect to the acts of the assembly by which the property of our own subjects resident here, was confiscated. The consequence of the argument for the plaintiff in error would be, that every act done by the Loyalists in America, previous to the treaty of peace, was admitted by that treaty to be an act of high treason against the State of New-York: but that can never be supported. The plaintiff came into this country subject to all his legal contracts, and armed with all the legal rights, which any other subject had.—It would be enough to stop here: but it has been said that, where the property of a subject of one country is confiscated, and vested in the sovereign State, every other country ought to take notice of the confiscation: but that was not the case; for these persons never were attainted by any act of a sovereign State, those acts were passed by the subjects of this country, who at that time withdrew themselves from the sovereign State; and assumed to themselves a power of making laws. It might equally be said, that if the Isle of Wight, or any town in this country, wished to throw off their allegiance to the King, and to assert what are called the rights of man, and to declare that they would no longer continue subjects of his government, they would immediately become an independent State. I am therefore most clearly of opinion, that the act of confiscation, which passed in 1779, cannot be considered in this country as competent to transfer the property of Folliot to any person whomsoever; and consequently that the right of action, which accompanied him when he came into this country, is not divested out of him. We were pressed at the close of the argument with the peculiar circumstances of the plaintiff in error, who, it was said, could have no remedy against his co-obligors in America, notwithstanding the

the judgment here, and who might even be sued again on this very bond in that country; but that argument ought not to guide our judgment; for I have always understood it to be clear law that all *judicial acts* done in one country over the property of the subjects within their jurisdiction, are conclusive on the property of those parties in any other country.

ASHHURST, J.—It is sufficient for me to say that I concur in opinion with Lord *Kenyon*. These parties came here as subjects of this country before the treaty of peace; and therefore any acts done by the State of New-York at that time, could not alter the rights of our own subjects. The plaintiff and the defendant came into this country in the character of creditor and debtor; and their situation as individuals was not affected by the acts of confiscation.

BULLER, J.—A very few words are sufficient to decide the present case. It is a general principle, that the penal laws of one country cannot be taken notice of in another. Then apply that principle to the present case: this is an action on a bond, to which the defendant has pleaded that by the penal laws of another country, the property of the plaintiff in the bond has been divested out of him: but this Court cannot take notice of that defence; and then all the pleadings are a nullity, and consequently the action remains unanswered. That is as much as is necessary to say in the determination of this particular case. Another question, however, having arisen in the argument, whether or not it was necessary that there should have been a seizure on the part of the State of New-York, in order to divest the property out of the plaintiff, I will give my opinion upon it. The answer given at the bar from the statute 33 *Hen. VIII.* cap. 10, that in this country the property of persons attainted is vested in the Crown without office, is not conclusive; and I am still of opinion that a seizure is necessary. The effect of that Act of Parliament is only to avoid the necessity of an office. The case of *Stone v. Newman*, shews what construction has been put on the statute. There, Sir T. Wyatt, being tenant in tail-male, with the reversion in the King, enfeoffed G. Moulton in fee; Sir T. Wyatt had issue G. Wyatt, who had issue Sir F. Wyatt, under whom the defendant claimed. But Sir T. Wyatt was attainted and the attainder was confirmed by a special act of parliament, enacting that he should forfeit all his lands, &c. and that they should be vested in the Queen *without office* (nearly in the same words as are used in the statute of *Henry VIII.*). That case was very elaborately discussed by all the Judges:
and

and in answer to an exception taken to the pleadings that no seisin was alledged in the Queen, and that then Sir F. Wyat's title was good until seisin, for he had the first possession, it was adjudged, "that it appeared that, after the attainder, the Queen being entitled by the general act of parliament, 33 Hen. VIII. and by the special act, 1 & 2 P. & M. it was in the Queen without office; and that the Queen granted it unto him under whom the plaintiff claimed, who entered and was seised, until Sir F. Wyat entered; so he had the priority of possession and right;" wherefore the exception was disallowed. It was so material in that case to give an answer to the objection, that the Court answered it by the fact of the case, namely, that there was an actual seizure. The instance put at the Bar, of an assignment by the commissioners of a bankrupt, which divests the property of the bankrupt without actual seizure, bears no analogy to this case. For there is a wide distinction between questions of property between one subject and another, and questions arising on the law of attainder between the Crown and a subject. And I shall never agree in extending the same rule of construction, which obtains in the former instance, to the latter case. It would be attended with peculiarly serious consequences to the present state of Europe; since then the property of foreigners, who are daily resorting for refuge to this country from confiscations at home, would not be protected against the designs of artful men, who could gain possession of it by any means.

GROSE, J.—I continue of the same opinion, which I entertained in the case of *Duiley v. Folliott*; and I most perfectly concur with the Court on this occasion. It has been correctly stated by my brother Buller, that the penal laws of one country cannot affect the laws and rights of citizens of another. Then if we were to determine that the plaintiff should not recover on this bond, we must say that the treaty of independence was retrospective, and that it had the effect of declaring that the property of the subjects of America resident in this country was forfeited by an act, which, at the time it passed, was considered as mere waste paper, or, if it were of any avail, was an act of treason. It has been objected against the plaintiff's recovering here, that the defendant will not recover in America against the co-obligor because the States of America will pay no regard to our judgments; and yet the argument is that we must pay a deference to the acts of those persons, whom we must consider to have been in a state of rebellion at the time when they were passed. Now if it be true that the States of America will

will not take notice of the judgments given in our courts of law, we should be doing great injustice to the present plaintiff to say that we must consider ourselves bound by their acts of confiscation.

Judgment affirmed.

Trial of FRANCIS FONTON, for Forgery.

Old Bailey, September Sessions, 1790.

Francis Fonton was indicted, for that he, on the 8th of May, 1789, in the parish of St. Christopher le Stocks, feloniously did falsely make, forge, and counterfeit, and cause and procure to be falsely made, forged, and counterfeited, and willingly act and assist in the false making, forging, and counterfeiting a certain receipt for money, with the name J. Pierce thereto subscribed, bearing date the said 8th of May; and which said false, forged, and counterfeited receipt is as follows: "50*l.* four *per cent.* annuities, consolidated, April 6th, 1780. Received this 8th day of May, 1789, of William Papps, the sum of 47*l.* 12*s.* 6*d.* being the consideration of 50*l.* interest or share in the capital or joint stock of 4*per cent.* annuities, consolidated April 6th, 1780, erected by Act of Parliament of the 17th, 20th, 21st, 22d, 23d, and 24th years of his Majesty King George the Third, intituled, an Act for raising a certain sum of money, by way of annuities, and for establishing a lottery, transferable at the Bank of England, together with the proportionable annuity attending the same by me this day transferred to the said William Papps; witness my hand, J. Pierce, 47*l.* 12*s.* 6*d.* witness F. Fonton," with intent to defraud William Papps.

A second Count, for uttering a like forged receipt, knowing it to be forged, with the like intention.

A third and fourth Count, for forging and uttering a like receipt, knowing it to be forged, with intention to defraud the Governor and Company of the Bank of England.

Mr.

Mr. Fielding, Counsel for the prosecution, opened it follows:

May it please your Lordship! Gentlemen of the honour to solicit your attention upon this holy occasion, as Counsel for the Governor and of the Bank of England. Gentlemen, the indictment forms you of the crime now imputed to the prisoner; and when you are informed that this is a receipt for money, in a transaction at the Bank, once receive the impression of all the importance an enquiry is of: it is not proper, on the present occasion, to travel out of the business which is the present charge; I shall not therefore bring for this time any other transactions of the prisoner, however they might bear on the present transaction and fairly be introduced into it, as they in possibility, seem to carry the appearance of charge accumulated imputation, more than was necessary for a crime so extremely criminal in itself: I shall only in now, therefore, that the prisoner at the bar has twenty years a servant of the Bank of England, and continued so long in such employ, bespeaks his character and reputation, till the time of this discovery, a fair one: indeed, Gentlemen, it is a most satisfactory consideration, when we contemplate that vast machine of credit, the Bank of England, that no occasion has wherein we have been called upon to question the wisdom of the regulation, the vigilance of the Directors, or the fidelity and integrity of their servants; for, till the present occasion, I think no such has arisen: acting, as the prisoner has done so many years in the Bank, apprised of all the regulations made by the Directors, unfortunately for him he has disobeyed one of them, which has involved the difficulties of this prosecution: as a Clerk, he was expressly forbid to act as a Broker; and, on the present occasion, he has violated that regulation. Gentlemen, the prisoner, while he was in this employ, not only gained the esteem and friendship of his brother officers, as well as the approbation of his masters, but likewise the confidence of several of his friends, who had intrusted him with the management of their concerns in the different places to which they had placed their money: among the persons to whom he had obtained this confidence, was the present prosecutor, Mr. Papps, who had employed him frequently in purchasing stock, but never in transferring any. On the 1st of May, Mr. Papps, having some money to lay

plied to the prisoner to purchase 50*l.* in the 4 *per cent.* annuities, he received the money from Mr. Papps; soon after which the prisoner told Mr. Papps that every thing was done and ready, and that he must sign the acceptance, and have the receipt; Papps, therefore, went with him to the desk, where a book was produced, and an instrument laid before him, which he signed, and which he conceived was an acceptance of the stock; but he did, in fact, put his signature to a transfer of 450*l.* stock of his own to the name of John Pierce; immediately after this, the prisoner delivered to him a receipt, signed J. Pierce, for that money which he had entrusted him with to purchase the 50*l.* annuity. I do not at present call your attention to the imposition made on Mr. Papps, in getting his hand to the signature of the transfer; this is a species of fraud, about which we are not at present enquiring; but you will see at once the relation which the *name* of that transfer bears to the name signed to the receipt given to Papps. Now to bring home the charge of forgery to the prisoner, it will be necessary for you to pay particular attention to the circumstances I shall state: Mr. Papps had been in intimacy with the prisoner at the bar for many years; he had transacted all his business at the Bank; and as the prisoner was well known to Papps, and Papps to the prisoner, it is impossible that any person can have imposed on the prisoner by assuming the person of Papps, where there was so intimate a knowledge between them. Gentlemen, you will find the prisoner signed his own name as the witness to this transfer; that of course links him to this transaction, as being concerned for Papps, when he first persuaded him to sign this transfer; then Mr. Pierce will tell you, he purchased 450*l.* stock, and the prisoner having obtained Papps's signature, was enabled to proffer this as a proper transfer, in order to turn it over to Pierce, and to get Pierce's acceptance; in truth, he did so; but Mr. Pierce, being a man conversant in the transactions of the Bank, he, in consequence of seeing this transfer, at once signed his acceptance, and there was an end of the business, and Pierce himself required no receipt: but the subject on which we are at present enquiring, is the receipt put into the hands of Papps, purporting to be the receipt of J. Pierce; I say, the name instantly suggested itself to the prisoner; he instantly made use of the name of Pierce to sign to that receipt, which he was to turn over to Papps, as a satisfaction for the money Papps had paid into his hands: so you see this transaction is then perfectly complete; the prisoner's knowledge of Papps cannot be doubted. Papps,
Gen-

Gentlemen, will come before you, and tell you, that he received this very receipt from the hands of the prisoner. Mr. Pierce will tell you, that on the same day he was at the Bank, and had the transaction I have related; that I signed such a receipt, and that it is a fabrication and forgery: Gentlemen, therefore, you perceive that the result of your enquiry lays within a very small compass; and it is always satisfactory that the minds of a jury should be cleared up from all the circumstances that attend the transaction. I am ready to trust that on your view and consideration of every circumstance, you will be convinced that it is not imputed to the prisoner has been effected in the way I have described. Now, Gentlemen, with respect to the evidence, it appears to me that there cannot be a possible imputation upon any of the evidence which I shall call to you. Mr. Papps comes forward here to give his testimony as an ancient friend; at the same time, Mr. Papps has no part in the present prosecution; indeed, I am anticipating objections which can have no force, and therefore I myself: these witnesses, when they tell you the simple transaction that I have explained, will, I trust, leave it in your minds; as to the receipt given to Papps, and which the charge of forgery is now established, the prisoner himself is a witness to that receipt: then, Gentlemen, it seems to me, that the case is precluded from every possible observation; those little matters which now arise in other cases, I think are totally shut out; as you compare the two transactions together, and take into your consideration the result of that comparison, you will be persuaded that the hand of the prisoner forged the receipt. Therefore, the trouble you will give to your attention to this case, will be short; the case is confined to the simple circumstance of his having forged the receipt, and the evidence lays in a very small compass. Gentlemen, lamentable it is, indeed, to see a perfect prisoner's appearance and description, standing at the bar on a charge like this; it must, on the present occasion, excite the minds of a British Jury emotions of compassion and every tender feeling; and so far from wishing to obstruct the course, nay, the full indulgence of those feelings, the Governor and Company of the Bank of England, will rejoice at every evidence of them; those feelings being at all times the best assurance of the faithful discharge of your respective duties whether you consider yourselves as citizens, or advert to that more important duty which you are now to discharge as a jury of your country.

William Papps sworn.

Mr. Knowlys, Prisoner's Counsel.—You come here under expectation to have all that stock replaced of which you was possessed; do not you come here under a promise to have 450*l.* replaced to you on condition of giving evidence against the prisoner?

A. Yes.

Q. Have you not had that expressly intimated to you, that on condition of giving evidence against this man, you should be replaced in this sum of 450*l.* stock.

A. No.

Q. How then did you form the expectation of having this stock replaced to you? Have not you had hopes given you that you should have 450*l.* or some sum on condition of giving evidence on this trial?

A. Yes.

Court. Do you mean to say that there had been a bargain between you and the Bank?

A. No; none at all.

Q. But if you give your evidence, you expect to have your 450*l.* again, and if not, you should not? You expect the stock shall be replaced to you?

A. Yes; I hope so.

Q. Have you made your bargain with the Bank about that; and have you stipulated with them, that provided they will do that, you will then give evidence; and if they do not, you will not give evidence?

A. Not from the Bank.

M. Knowlys. From whom then was it that you had that hope given you; was it from any servant; any person employed by the Bank in any manner whatsoever.

Court. Has there been any consideration between you and any body on the part of the Bank, respecting your giving your evidence in this case, making you any promises if you should do it?

A. No; none at all from the Bank.

Q. Do you know the Solicitor of the Bank, Mr. Win-

A. Yes.

Q. Was it intimated by him?

A. Yes; he gave me some hopes of recovering it.

Court. But was it on condition that you would give evidence on this trial?

A. Yes, my Lord.

W. H.

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Mr.

Mr. Fielding. You perceive this 450*l.* transfer is not immediately connected with the indictment?

Court. Suppose it is not; if this man will come here and say he expects 450*l.* in money for giving his evidence, to be sure I shall reject his testimony.

Q. Did you make a bargain with the Solicitor?

A. No; I made no bargain at all.

Q. Did he on his part promise you, that if you would give the evidence, then he would transfer to you.

A. He did not mention any such thing.

Q. Did he make it an express condition, that on condition of giving your evidence, it should be replaced?

A. No.

Mr. Ruffel. Do you know the prisoner at the bar?

A. Yes.

Q. How long?

A. Some years.

Q. During that time, have you been very intimately acquainted with him?

A. Not very; he used to come backwards and forwards to my house.

Q. Did you ever employ him to do business in the Stock for you?

A. Yes, as an acquaintance.

Q. Did you employ him to buy any stock for you in May 1789?

A. Fifty pounds, 4 per cents.

Q. Did he undertake to do it?

A. Yes; and gave a receipt for it.

Q. How soon did you see him after this business.

A. Not for some time afterwards.

Q. Did he tell you at any time that he had bought it for you?

A. Yes; he gave me a receipt for it.

Q. Did you write your name?

A. Yes, to a transfer book.

Q. When you wrote your name to that transfer book, did you consider yourself writing your name to the transfer book, or to the acceptance book?

A. I did not know it was a transfer book; I thought it had been an acceptance book.

Q. Did he give you the receipt at the same time that you signed your name, or a different time?

A. At the same time.

Q. When did you pay him the money?

A. The

A. The same day.

Q. Before or after you took the receipt?

A. Before I took the receipt, he came and told me he would get it ready against I came; and I used to go and leave it entirely to him.

Q. How much did you pay?

A. I cannot recollect justly what the stocks were; what 50*l.* cost; but he put it on the receipt himself.

Q. Was that the paper he gave you?

A. Yes.

Q. At the time you signed your name?

A. At the time I signed my name; and he put the figures on the back.

Q. Is that your hand-writing?

A. Yes.

Q. Do you know Mr. Fonton's hand-writing.

A. I have seen it.

Q. Is that his hand-writing; look at it?

A. Yes, I believe it is; it is very much like what I have seen in the corner of the receipt.

Q. Look at the receipt, at that name, Francis Fonton?

A. I believe that to be his hand-writing.

Q. Did you at any time after that day receive your dividend at the Bank?

A. I received my dividend that same day.

Q. Have you received it since May, 1789?

A. Yes; at Lady-Day last.

Q. How much did you receive for your dividend?

A. I received 12*l.* for 650*l.* of Mr. Fonton.

Q. Was the dividend you received last Lady-Day the whole amount of your stock, suppose that 450*l.* was standing there?

A. Yes.

Q. Does that include 50*l.* that you supposed you had bought that day?

A. That made it up 650*l.*

Q. How came Fonton to pay you the dividend; was it his business?

A. He never paid me but twice; he used to give the dividend, he said, to save me the trouble of waiting.

Mr. Knowlys. I ask you whether you did not say yesterday, about five in the afternoon, to any body, that you had been promised by Mr. Winter, to have your 450*l.* stock replaced, in case you gave your evidence on this business, and all your expences; and that if you did not, you would not?

A. No, there was nothing mentioned about expense there were three gentlemen called upon me yesterday in afternoon.

Q. Did not you say to these three gentlemen, that you had been promised by Mr. Winter to have your 450*l.* replaced, in case you gave evidence on this business, and your expenses, and that if you did not, you would not and that you would not have come if that promise had been made.

A. No, I said no such thing; they called upon me about appearing against Mr. Fonton; and I told them I must appear, I could not do otherwise: I never made any such promise to any body.

Q. Did you relate to any body yesterday, that such conversation passed between Mr. Winter and you?

A. I did not say any such words as not appearing.

Q. Did not you tell them that you had a promise made you by Mr. Winter to have your 450*l.* replaced, in case you gave evidence on this business, and if you did not, you would not?

A. Mr. Winter said, he hoped it would be replaced, I understood him; but I never made any agreement or bargain about it.

Q. Then did not you tell somebody yesterday, that Mr. Winter had promised you that the stock should be replaced if you appeared, and gave evidence on this trial?

A. No; not to the gentleman that called yesterday.

Mr. Ruffel. What gentleman was that that called yesterday?

A. The gentleman is in Court.

Q. Point out the man?

A. That gentleman is one that called; Mr. Slack.

Q. What did he call about?

A. He called about Mr. Fonton's affair; Mr. Slack mentioned to me to know if I should appear, and I told him I was obliged to it.

Q. What passed between you about it?

A. I cannot recollect very particularly.

Q. Try: what did he want of you; what did he come to you about?

A. He came with intent like, as for me not to appear against him.

Q. What did he say to you on that subject?

A. I cannot recollect the very words.

Q. I do not want the very words, but the sense of them.

A. It was something concerning the not appearing against him.

Q. What was it?

A. It was, that if the money was replaced by any person, that I would not appear against him: I told him I was obliged to it.

Q. What more?

A. Nothing further that I can recollect: I said, I was obliged to come, because I was subpoenaed to appear.

William Edwards, Esq. sworn.

Mr. Garrow. You are Accomptant to the Bank of England?

A. Yes: I believe this to be the hand-writing of the prisoner.

Q. Look at this transfer-book; do you believe the name subscribed as witness to the transfer of Mr. Papps, is the hand-writing of the prisoner or not?

A. I do; the body of the receipt, which is not printed, and the filling up of the transfer, is his hand-writing.

John Pierce sworn.

I live in Queen-Street, Lincoln's-Inn-Fields.

Q. I believe you are sometimes described of the Stock-Exchange?

A. Yes.

Q. You do business there frequently?

A. Yes.

Q. Be so good as to look at the signature of that; is that your hand-writing?

A. It is not.

Q. Did you on that day that appears to be dated, have any such transfer as that receipt imports?

A. No.

Q. You did not transfer 50*l.* stock on that day to any body?

A. I do not know to any body; but not in his name.

Q. Did you sell any sum of 50*l.* stock to the prisoner Fonton on that day?

A. No, I did not.

Q. Do you remember any transaction that you had respecting stock with the prisoner upon that day?

A. Yes.

Q. State what it was?

A. I bought 450*l.* of the prisoner.

Q. Look

Q. Look at this book, and see whether that acceptance of a transfer belongs to you?

A. That was the 450*l.* that was paid by me; the person who transacts business for me, who is in Court, one Mr. Brown, paid it to Mr. Fonton.

Q. You gave directions to Mr. Brown?

Court. I suppose you have other witnesses to prove that this is not the hand-writing of another Mr. Pierce; because I doubt a little whether Mr. Pierce is a proper witness to prove his own hand-writing.

Mr. Garrow. We have a release.

Hugh Percy Repworth sworn.

I am Clerk to the Solicitor of the Bank. I saw this executed by Mr. Papps.

Mr. Garrow. This is a release from Mr. Papps.

Q. to Mr. Edwards. Are you acquainted with Mr. Pierce's hand-writing.

A. I have frequently seen his signature; he was a Clerk in the Bank many years.

Q. Look at this, and see if it is his signature?

A. It does not appear to be his signature.

Robert Hand sworn.

I am Clerk to the Three Per Cent. Consolidated Office at the Bank.

Q. Have you examined the books of the Bank with a view to discover how many persons of the name of Pierce had stock in the three per cent. annuities?

A. One John Pierce, of Barn-Elms; and the other John Pierce, of Queen-Street, saddler.

Q. That is the same person that has just been examined?

A. Yes.

Q. Have you examined the transfer books of that day?

A. I have.

Q. Is there any transfer made on that day by John Pierce to any body.

A. There is no transfer by John Pierce to Papps.

Q. Is there any transfer by Papps to any body?

A. Not that I could find.

Mr. Garrow. Now we will proceed to prove that John Pierce, of Barn Elms, was at that time dead.

Mr. Knowlys. Did you examine for any person of the name of James Pierce, or Joseph Pierce, or Ignatius Pierce, or Francis Pierce?

A. No, Sir; no other but John.

Sarah Pierce sworn.

I am widow of Mr. John Pierce, of Barn-Elms; he died the 18th of May 1788.

Q. to Mr. Edwards. Do you know whether on this day we have been talking of, it was the duty of the prisoner to fill up the transfers in the Three Per Cent. Office?

A. It was no part of his duty; his department was at that time to pay dividends in the Three Per Cent. Annuity-Office; there were other persons appointed to do this duty of filling up transfers.

Court. Did he pay dividends, or deliver out warrants?

A. Deliver out the warrants.

Mr. Garrow. Do you know of any order that was communicated to the Clerks, by the Directors, that no Clerks in the Bank should act as Brokers?

A. There was.

Q. That I believe is written up in the Office?

A. Not in those express words; "No Clerk in the Bank is permitted to act as Broker or Jobber in any of the funds."

Mr. Knowlys. Notwithstanding that order, I believe it is pretty well known to the world that it is done by more than one?

A. I believe it is.

John Brown sworn.

I do business for Mr. John Pierce, the Stock-Broker. On the 18th of May, 1789, I paid the prisoner, Mr. Fonton, £81.1s. 3d. as the consideration for transfer of 450l. four per cents.

Q. Do you recollect how you paid it?

A. I do not exactly; it was in cash and Bank Notes.

Q. Did you take a stock receipt from him?

A. No, Sir; I had no receipt.

Q. Do these kind of transactions frequently pass between the brokers without receipts?

A. Very frequently in the multiplicity of business: we see the transfer is made.

Q. Did you on this occasion satisfy yourself that the transfer was made to your principal?

A. Yes; I was satisfied of that.

Mr. Knowlys. Then you do not consider the receipt as absolutely necessary among yourselves?

A. Not as a jobber.

Mr.

Mr. Garrow to Pierce. Did you take any receipt on this occasion?

A. No.

Q. How happened that?

A. Oh, we frequently do them without a receipt; I went and looked at the books, to see if there was any transfer.

Q. How long have you known the prisoner?

A. A great number of years.

Q. Are you acquainted with the character of his hand-writing?

A. I have seen it frequently, because I have a great number of receipts of his.

Q. Look at that receipt?

A. I believe it to be his.

Q. Look at the written part of the body of the transfer; do you believe that to be his?

A. Yes, I believe it is his.

Q. Look at the body of this receipt; is that the hand-writing of Fonton?

A. Yes.

Q. Do you believe both of them to be the hand-writing of the prisoner?

A. I believe both of them to be his.

The Receipt read by the Clerk.

‘ 4 per cent. annuities, consolidated April the 6th 1780.
 ‘ Received of William Papps, the sum of 47*l*. 12*s*. 6*d*. be-
 ‘ ing the consideration of 50*l*. interest or share in the ca-
 ‘ pital or joint stock of 4 per cent. annuities, consolidated
 ‘ April the 6th, 1780, erected by acts of parliament, the
 ‘ 17th, 20th, 21st, 22d, 23d, and 24th years of the reign
 ‘ of his Majesty, King George the Third, intituled, “ An
 ‘ Act for raising a Sum of Money by way of Annuities,
 ‘ and for establishing a Lottery,” Transferrable at the Bank
 ‘ of England, by him transferred this 15th of May. Wit-
 ‘ nesses my hand, “ John Pierce.” Witness, “ F. Fonton.”
 ‘ Directed to the Court of Directors.’

Q. to Mr. Edwards. These receipts have been therefore given, when stock is transferred by power of attorney?

A. The seller gives the buyer his receipts: the attorney signs his name as attorney, and names the principal.

Q. So then, according to the common practice, the name of the proprietor himself is signed; it is understood to be the name of the proprietor?

A. The receipt is given by the attorney for such a one.

Q. You know, by looking at the receipt, whether it is a receipt given by the proprietor himself, or by power of attorney?

A. Yes.

Mr. Knowlys. That receipt is for 50 much stock purchased of Mr. Pierce, not a sale?

A. Yes, it is.

Court. Prisoner Fonton, you hear the charge against you; that it is the having put into the hands of Mr. Papps, a forged receipt, from one John Pierce, for the consideration money of 50*l.* stock, which receipt you witnessed, and which they say is a forged receipt; for that in the first place, as far as they have been able to trace any John Pierce, they have proved that this receipt is not his hand-writing; but beyond that, there is this strong circumstantial evidence, to prove it a forgery. That, whereas, that receipt expresses that this was received for the consideration of 50*l.* transferred by Pierce to him; there is no transfer by any Pierce to him of that sum; and it is witnessed, and the body of it written by you. You are now called upon to satisfy the Jury, if you can, how you came to put into the hands of Mr. Papps, such a false receipt.

Prisoner. My Lord, I leave my defence to my Counsel.

Mr. Knowlys. My Lord, I have a great many witnesses to his character.

Court. If his witnesses should happen not to be here, he certainly will suffer nothing by that means, because the circumstance of his having been employed 17 years and upwards, at the Bank, is a decisive evidence of his good character.

Mr. Edwards. I have known him eighteen years; he has always borne the character of a punctual orderly well-behaved man, very inoffensive in his manners; so much so, that he would have been one of the last in the house that I should have thought capable of such a transaction.

The prisoner called five more witnesses, who gave him an exceeding good character.

Verdict of the Jury, GUILTY of uttering, knowing it to be forged.

He accordingly received sentence of DEATH.

JUDG-

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J U D G M E N T

DELIVERED BY

SIR WILLIAM SCOTT, KNIGHT,

IN THE

CONSISTORY COURT, IN DOCTORS COMMONS,

IN THE CASE OF

AUGUSTA EVANS, *the Wife,*

VERSUS

THOMAS EVANS, Esq. *the Husband,*

JULY 2, 1790.

The Libel stated, at considerable length, numerous instances of cruelty and ill-treatment, and the depositions of the witnesses were very voluminous, which, as the material parts were recited in the learned Judge's speech, we do not here particularize.

The case was most elaborately argued on both sides, after which the learned Judge delivered judgment as follows:

SIR WILLIAM SCOTT, KNT.

This cause has been carefully instructed with evidence by the practisers, who have had the conduct of it; and has been very elaborately argued by the Counsel on both sides. It now devolves upon me to pronounce the legal result of the evidence, which has been thus collected; and of the arguments raised upon that evidence: a duty heavy in itself, from

from the quantity and weight of the matter; and extremely painful, from the nature and tendency of a great part of it; and from the inefficacy of this Court to give relief adequate to the wishes of both parties. Heavy and painful as it is, it is a duty which *must* be discharged; and which can only be discharged with satisfaction under a consciousness, that it is discharged with attention and impartiality; and under the reflection, that if, after the endeavours, which I have used in cleansing and in instructing my own conscience upon the subject, I should have taken what may be deemed an undue impression of the case, the laws of this country have not been deficient in providing a mode by which the parties may be relieved against the infirmities of my judgment.

The humanity of the Court has been loudly and repeatedly invoked. Humanity is the second virtue of courts; but undoubtedly the first is justice. If it were a question of humanity simply, and of humanity which confined its views merely to the happiness of the present parties, it would be a question easily decided upon first impressions. Every body must feel a wish to sever those who wish to live separate from each other, who cannot live together with any degree of harmony, and consequently with any degree of happiness, but my situation does not allow me to indulge the feelings, much less the first feelings of an individual. The law has said, that married persons shall not be legally separated upon the mere disinclination of one or both to cohabit together. The disinclination must be founded upon reasons which the law approves, and it is my duty to see whether those reasons exist in the present case.

To vindicate the policy of the law is no necessary part of the office of a judge; but if it were, it would not be difficult to shew that the law in this respect has acted with its usual wisdom and humanity, with that true wisdom, and that real humanity, that regards the general interests of mankind. For though in particular cases the repugnance of the law to dissolve the obligations of matrimonial cohabitation may operate with great severity upon individuals; yet it must be carefully remembered, that the general happiness of the married life is secured by its indissolubility. When people understand that they *must* live together except for a very few reasons known to the law; they learn to soften by mutual accommodation that yoke which they know they cannot shake off; they become good husbands and good wives from the necessity of remaining husbands and wives; for necessity is a powerful master in teaching the

the duties which it imposes. If it were once understood, that upon mutual disgust married persons might be legally separated; many couples, who now pass through the world with mutual comfort, with attention to their common offspring and to the moral order of civil society, might have been at this moment living in a state of mutual unkindness; in a state of estrangement from their common offspring; and in a state of the most licentious and unreserved immorality. In this case, as in many others, the happiness of some individuals must be sacrificed to the greater and more general good.

That the duty of cohabitation is released by the cruelty of one of the parties, is admitted, but the question occurs, *What is cruelty?* In the present case it is hardly necessary for me to define it; because the facts here complained of are such, as fall within the most restricted definition of cruelty; they affect not only the comfort, but they affect the health, and even the life of the party. I shall therefore decline the task of laying down a direct definition. This however must be understood, that it is the duty of courts, and consequently the inclination of courts, to keep the rule extremely strict. The causes must be grave and weighty, and such as shew an absolute impossibility that the duties of the married life can be discharged. In a state of personal danger, no duties can be discharged; for the duty of self-preservation must take place before the duties of marriage, which are secondary both in commencement and in obligation; but what falls short of this, is with great caution to be admitted. The rule of *per quod consortium amittitur* is but an inadequate test, for it still remains to be enquired, what conduct ought to produce that effect? Whether the *consortium* is reasonably lost? And whether the party quitting has not too hastily abandoned the *consortium*? What merely wounds the mental feelings, is in few cases to be admitted, where they are not accompanied with bodily injury, either actual or menaced. Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty: they are high moral offences in the marriage-state undoubtedly, not innocent surely in any state of life; but still they are not that cruelty against which the law can relieve. Under such misconduct of either of the parties (for it may exist on the one side as well as on the other) the suffering party must bear in some degree the consequences of as-

injudicious connection; must subdue by decent resistance or by prudent conciliation, and if they cannot, they must suffer in silence. And if it be complained that by this inactivity of the courts much injustice may be suffered, and much misery produced, the answer is, that Courts of Justice do not pretend to furnish cures for all the miseries of human life. They redress or punish gross violations of duty; but they go no farther; they cannot make men virtuous: and, as the happiness of the world depends upon its virtue, there may be much unhappiness in it which human laws cannot undertake to remove.

Still less is it cruelty, where it wounds not the natural feelings, but the acquired feelings arising from particular rank and situation; for the Court has no scale of sensibilities by which it can gauge the quantum of injury done and felt; and therefore, though the Court will not absolutely exclude considerations of that sort, where they are stated merely as matter of aggravation; yet they cannot constitute cruelty where it would not otherwise have existed: of course, the denial of little indulgences and particular accommodations which the delicacy of the world is apt to number amongst its necessities, is not cruelty. It may to be sure be a harsh thing to refuse the use of a carriage, or the use of a servant; it may in many cases be extremely unhand-some, extremely disgraceful to the character of the husband; but the Ecclesiastical Court does not look to such matters: the great ends of marriage may very well be carried on without them; and if people will quarrel about such matters (and which they certainly may do in many cases with a great deal of acrimony, and sometimes with much reason) they yet must decide such matters as well as they can in their own domestic forum.

These are negative descriptions of cruelty; they shew only what is *not* cruelty, and are yet perhaps the safest definitions which can be given under the infinite variety of possible cases that may come before the Court; but if it were at all necessary to lay down an affirmative rule, I take it that the rule cited by Dr. Bever from Clarke, and the other books of practice, is a good general outline of the common law, the law of this country, upon this subject. In the older cases of this sort, which I have had an opportunity of looking into, I have observed that the danger of life, limb, or health, is usually inserted as the ground upon which the Court has proceeded to a separation. This doctrine has been repeatedly applied by the Court in the cases
that

that have been cited. The Court has never been driven off this ground. It has been always jealous of the inconvenience of departing from it; and I have heard no one case cited in which the Court has granted a divorce, without proof given of a *reasonable apprehension* of bodily hurt. I say an *apprehension*, because assuredly the Court is not to wait till the hurt is actually done; but the apprehension must be *reasonable*; it must not be an apprehension arising merely from an exquisite and diseased sensibility of mind: petty vexations applied to such a constitution of mind, may certainly in time wear out the animal machine, but still they are not cases of legal relief; people must relieve themselves as well as they can by prudent resistance; by calling in the succours of religion and the consolation of friends; but the aid of Courts is not to be resorted to in such cases with any effect.

The parties in this case are a Mr. and Mrs. Evans proceeding in a cause of cruelty brought by Mrs. Evans against her husband.

The libel states the marriage at Calcutta, in the East-Indies, in the year 1778; and it proceeds to plead the character of the parties; *that he is a person morose, fullen, tyrannical*, and so on; and that *she is in every respect the reverse, a woman of mild and tender disposition*. These pictures are reversed, as is the usual manner, in the responsive allegation. It is usual, in these sorts of causes, to admit articles pleading in this manner the characters of the respective parties; it is usual, I say, to *admit* such articles; but I have not understood that it is usual to examine upon them, or at least to examine upon them in the proportion which has been done in the present cause: and I think that I feel the weight of some reasons which would induce me very much to question the propriety of *admitting* such articles at all, if they were likely in other cases to lead to the consequences they have done in this; for a very great part of this voluminous enquiry has turned, not upon the matter in issue in the present cause, but upon the general character of the two parties; and I have been loudly called upon on both sides to determine that which I am not called upon, either by the nature of the authority which I possess, or by the necessity of the present case, to pronounce, viz. the result of that evidence upon general character.

Upon evidence of this kind it is impossible not to remark, that it is unsatisfactory in the extreme; it is *opinion*

- at best; the opinion of persons whose powers of judging upon any question of delicacy and importance are utterly unknown to me; whose partialities and prejudices, to colour and influence those opinions, are equally unknown to me. To take such opinions then, and to apply them to the proof of *controverted facts*, and those facts too of a criminal nature, does seem to be extremely unsafe. The case indeed is *civil* as has been repeatedly observed, but the facts undoubtedly are criminal; or else why plead the bad disposition of the husband? Why plead it, except for the purpose of shewing that he has committed bad acts? Now I know hardly any case in which it is allowed to create a presumption in favour of the probability of criminal facts having been done, where that presumption is founded upon the mere opinions of men concerning general disposition. Criminal facts must be tried by themselves. To try them by opinions, and by opinions collected in this sort of way, is extremely dangerous for the Court: to the individual who is exposed to an enquiry of this kind, it is dangerous in the extreme: to place a man in this sort of legal pillory, where all who choose may pelt at him, is exposing an individual to the injustice of mankind, in such a way, as I am sure the justice of courts cannot relieve him from.

What I have to say upon this part of the case therefore will be extremely short, because it is merely a digression for the satisfaction of the parties; it is no foundation; no principle; no part of that legal proof upon which I shall determine this case.

And I must here take the opportunity of saying, that if the truth of this charge rested upon matter of character alone, it would determine me very favourably in behalf of Mr. Evans. Here are the attestations of a great number of persons; gentlemen extremely respectable in their own characters and situations; connected with him by early and familiar acquaintance; by habits of a long intercourse; by habits of business. But all this, it is said, is the *partiality of friends*. What, is it nothing in a man's favour to have friends? Can a man say any thing that bears more strongly in his favour, than that he has friends? partial friends? friends who have become so, and can have become so, from the opinion only of his good deservings? They are persons, many of them, who have lived with him in a distant country, where countrymen collect together in close and intimate connection; *where they form* (as one of the witnesses describes it) *one community*: some of them, two of them in

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particular, have lived with him in the same family; in the family of Mr. Hastings; they have been connected with him in the conduct of business, where his temper was daily seen and daily tried; for business, as we all know, is very apt to expose the real dispositions of men: it is a tyrannical master, and if a man can go through the difficulties which even the smoothest course of business will throw in his way, with an unruffled temper, it is no mean argument of a tractable disposition.

All this, it is said, may be very true; but it has happened in other cases, that a man has worn a mask to the public, and pulled it off to his family. Undoubtedly there may have been such cases; cases of moral prodigies; cases of disgraceful exceptions to the ordinary course of nature; but the general presumption at least is strong the other way. If a man shews upon all occasions an obliging disposition in his general intercourse with the world; the presumption certainly is, that he carries that disposition with him into the private recesses of his life. If he is a good friend, the probability is that he is a good husband, which is a friend only of a nearer and dearer nature. It is to be added too, that in this case almost all the witnesses speak to this very specific part of Mr. Evans's character; even the witnesses who are examined on the part of Mrs. Evans. There are particularly Mr. Wood, Dr. Curry, Tomlings (with the exception of one fact) Mr. Paumier, Mr. Griffiths, Mr. Beehm, Mrs. Webber (with the exception of one fact likewise); all these witnesses, who are examined on the part of Mrs. Evans, bear an honourable testimony to his general and visible conduct.

Well, but it is said, there are witnesses who depose in a contrary manner, and you cannot reconcile these two sets of witnesses together, but upon the supposition that what is said by the first set of witnesses is the effect of mere hypocritical assumption. Now the other witnesses who depose unfavourably (with the exception of Mrs. Hartle, and a young French woman, Madame Bobillier, whom I shall speak of by and by) are Mr. and Mrs. Thackeray, and Mr. Moore. Mrs. Moore has not yet been examined in this cause, and the reason given for that has been, that she being the sister of the party, might be a witness whom the Court would hear with a great deal of jealousy and suspicion. Why, most assuredly the same circumstances of jealousy hang upon the characters of every one of these witnesses; they are all persons nearly allied; are subject, of course,

prejudice; I don't say to a dishonest or dishonourable prejudice, but from that circumstance they are subject to prejudice.

There is another observation that strikes me, and that is this, that all these witnesses (with the single exception of Mr. Moore) found their opinions upon the very facts controverted in the cause. Mr. Thackeray, who has given a very candid testimony in the cause, and on whom I shall very much rely in the determination of it, says expressly, "that till some time after Mr. Evans's return to England, he had always a good opinion of him," and he expressly founds his present opinion upon the facts that are now in issue between the parties. Why, then, only consider what is done in this case. In the first place, the witnesses extract their opinions from these particular facts, and then it is expected that the Court shall take those opinions and apply them to the establishment of the very facts in question. To be sure, if there is such a thing as circularity in argument, this is that; and grosser injustice than that could not be committed. Mr. Moore, indeed, stands upon a very different footing, he goes back to a remoter opinion; his opinion does not arise out of the facts in issue; he refers to a much earlier period of time. Now there are one or two observations, which strike me pretty forcibly upon the testimony of Mr. Moore. Mr. Moore is a man of sense, he knows, I dare say, extremely well, that caution and that sobriety of mind which belongs to a witness deposing in a Court of Justice to the character of another individual. And I am very sure he does not come here to amuse himself or the Court with drawing highly finished pictures; I am therefore to suppose, as I do, that Mr. Moore is not only perfectly sincere, but that he rather falls short than exaggerates the impression upon his mind, in the character which he gives of this gentleman; but that character is this; "That he became intimately acquainted with Mr. Evans, and was a good deal in his company, and saw much of him, prior to his marriage; that after his marriage, until the month of April, 1780, their families visited; but from the said month, until the arrival of Mr. Evans in England, he had little or no intercourse with him; but that upon his said arrival, and for some time afterwards, he the deponent often saw and was a good deal in his company; and has at different periods prior to his marriage when he was likely to become allied to the deponent's family, and until Mrs. Evans was obliged to quit his house, given a watching and scrutinizing eye over his

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“conduct and disposition, and is thereby enabled to say,
 “that he knows him to be a man of wicked, profligate,
 “and abandoned principles, and of a morose, tyrannical,
 “cruel, and savage disposition, void of common humanity,
 “vindictive, full of animosity and revenge, of a turbulent
 “and intolerable temper, avaricious and mean to excess, a
 “great dissembler and hypocrite, filthy in his ideas, and de-
 “lighting in the dirty expression of them; and so much
 “given to deceit, scandal, and falsehood, that, from a very
 “early period after his aforesaid marriage, it was a rule in
 “the deponent’s family never to believe what he said; and
 “that he, the deponent, has often heard him scoff at the
 “religion of the church to which he was brought up or
 “professed; that he has often heard him pride himself on
 “his apathy and callousness, and knows him to be of callous
 “feelings; and that he had the character of a morose, ty-
 “rannical, cruel master amongst his native servants in In-
 “dia.” And he concludes by pronouncing him, in another
 passage of his deposition, a person “unfit for admission into
 “society.”

Now taking this character into consideration, these circumstances do seem to me to be a little extraordinary. This young lady went over to India into the family and under the protection of Mr. Moore; Mr. Moore was acting by her with the substituted authority of a parent; he was perfectly acquainted with the detestable character of this gentleman; it is a courtship which goes on for many months (that is proved by Mr. Moore himself) and yet it does happen that this poor young creature is suffered to fall into the hands of this monster. The marriage is graced by the presence of Mr. Moore, by the presence of some of the most respectable persons then resident in the country, Mr. Vanstittart, Mr. Perring, Sir John D’Oyly; an afflicting ceremony it undoubtedly must have been to Mr. Moore; it must, in fact, I am sure, have been considered by him literally as leading her to the altar to be sacrificed. It may be said, indeed, that this was an act of necessity on his part. Be it so. This however might have been expected from a brother’s affection and attention (for a brother he certainly has shewn himself throughout this business) that he would at least have taken the most early opportunities of acquainting the other parts of his family with this great misfortune which had happened to it; Mr. Thackeray, Mrs. Thackeray, and every member of the family in England, must have been informed by him, if it was only for the security of this poor unhappy young woman, who was so sacrificed.

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that she was in the hands of one of the most detestable of mankind. Yet nothing is more clear to me than that nothing of this sort ever was communicated, otherwise Mr. Thackeray could not have deposed that he continued "his good opinion of Mr. Evans till after his arrival in England." It is impossible, therefore, that it could have been communicated to Mr. Thackeray, or in short to any one of the family. I think, therefore, I have, in this case, Mr. Moore's deposition speaking one way, and Mr. Moore's conduct speaking another; and, where they speak different ways, I know which I have to trust to. I have only one way of conceiving the matter, and that is this: his present opinion is sincere, but it is only his present opinion; he has not cautiously watched the rise of it in his mind; he is accurate in tracing back its commencement to the period at which he does: it is not, as he supposes, the fruit of early and dispassionate observation; it is the fruit of passion, of modern passion, produced by the resentments excited by the later dissensions in this family.

Upon the whole, then, I see most honourable attestations to the character of Mr. Evans; and I think I have reason to presume, that, if late dissensions had not happened, I should have seen no attestations but such as were perfectly honourable to his character.

On the character of Mrs. Evans, I shall say much less, for this reason; because it is much less connected with the issue in the cause; because, if the facts imputed to Mr. Evans are false, there is an end of the question: on the contrary, if they are true, they are of that nature and species, that they cannot be justified by any misconduct on the part of Mrs. Evans; for though misconduct may authorize a husband in restraining a wife of her personal liberty, yet no misconduct of hers could authorize him in occasioning premature delivery, or refusing her the use of common sense. In every view therefore of the matter, Mrs. Evans's character has nothing to do with the cause; and in a cause where so much is to be said upon the necessary parts, I will waste but few words upon such as are unnecessary and altogether impertinent to the cause. The little that I have said, is for the satisfaction of the parties; and it is this, and here again, if the matter rested simply upon the evidence given of character, yet after all the unhappy pains that have been taken to blacken each other, I see no reason why these two persons might not have passed through the world comfortably together, with a little discretion and management on their own side, and some discretion and management

nagement on the part of those who are mutually connected with them. To be sure, if people come together in marriage with the extravagant expectations that all are to be halcyon days; the husband conceiving that all is to be authority with him; and the wife, that all is to be accommodation to her; every body sees how that must end: but if they come together with the reflection, that, not bringing perfection in themselves, they have no right to expect it on the other side; that having respectively many infirmities of their own to be overlooked, they must overlook the infirmities of each other; then, if friends will be discreet enough to support them in the execution of their duty, there is a high probability that something like happiness might be produced.

With respect to Mrs. Evans, there are many attestations much too honourable to be applied to any character that was unamiable, and these too come from witnesses examined for Mr. Evans. What bears a contrary aspect, seems to have come at a later period, when dissensions had arisen, when servants and friends had entered into the factions of the family, had taken sides, and had, of course a bias hung upon their judgments. But what I principally rest upon, is the testimony of early acquaintance; of acquaintance before hostilities commenced; of Mr. Hannay, Mr. Maxwell, Mr. Halhed, and others. Such persons, I think, must form a safer judgment than Mr. Mason; much of whose judgment, in all probability, is formed upon the complaints of the husband. I think the attachment of her family, the zealous and animated part which they have taken in her behalf on this occasion, speaks strongly in her favour; and I do assent to the observation that has been made, that if she had been the worthless person she is represented, they would not have stood forward in the manner they have done.

There is one odious imputation in the cause, which I have heard with great pain, and to which I advert with great reluctance, and it is merely for the purpose of saying, that I think it an imputation unfounded and ill advised; and I can never give way to it upon the evidence that has been given. The appearances of a woman affected by nervous disorders in a way in which this poor lady, it is in proof, was often affected, are equivocal enough to mislead a stranger, as Mr. Mason appears very much to have been; and as to the servant, Fraser, *the facts* themselves are so trifling, to which he speaks, that they amount to little; and when I reflect upon the licence of observation exercised by people of this

this kind upon the conduct of their masters and mistresses, I must consider it as amounting to nothing. I have then no evidence before me on which it is possible to suppose that the character of this lady is at all polluted by so degrading a habit.

So much, then, for matter of character in this cause; which part of it I now gladly leave to come to the real subject of the cause—the conduct of Mr. Evans towards his wife;—and, in order to examine that, I must look back a little into their history.

Mr. Evans went to the East Indies, I think, in the year 1770;—he was employed in the usual occupation of gentlemen who resort to that country; in making, or improving, his fortune.—He was in the immediate service of Mr. Hastings, the then Governor-General. In 1776, Miss Webb, the daughter of a respectable person in his Majesty's military service, went over to Calcutta, upon a visit to two sisters who were married and resident there; a Mrs. Moore and a Mrs. Thackeray. It appears, I think, that Mr. Thackeray and his wife were at this time resident with Mr. Moore, but that they left Calcutta before Miss Webb was settled in marriage. In November, 1778, the marriage took place, after a courtship of some months, as I have already stated. At the time of the marriage, he made a settlement upon her; to which Sir John D'Oyly was a trustee; and Mr. Boehm, his agent in England, speaks to his belief, that this was a settlement to her sole and separate use. Mrs. Evans appears to have been of a delicate constitution, and the climate of India by no means agreed with her. It is proved by Sir John D'Oyly that she was often in fits in a very early period of the marriage; that is what he expressly swears. Mr. Maxwell proves, that when she pressed a return to England upon her husband, it was stated that the climate of India did not agree with her. In other respects I see no reason to presume that the marriage was not as productive of mutual happiness as marriages usually are.—Sir John D'Oyly swears expressly that she “at that time appeared very fond of him;” Mr. Griffiths, Mr. Wood, and several other witnesses who are examined as to the character and conduct of the parties, and who lived in considerable habits of intimacy with them at that time, give me no reason whatever to suspect that any thing like unhappiness then subsisted between them: and all the witnesses, I think, who depose to that period, speak with as little apprehension as to what has since happened, as is possible.

In 1781, Mrs. Evans left India on account of her health. Mr. Evans's counsel have taken credit on account of his acquiescence in this separation. Now, this credit is denied, upon the ground that this acquiescence might have been merely for the purpose of getting rid of her. Why, to be sure, if his preceding conduct had been that of a disaffected husband, such a construction might have been fair enough; but if otherwise, it is rather hard to give such an interpretation to the very step which the most affectionate husband must have taken. Credit is taken likewise, by the counsel on behalf of Mr. Evans, that no cruelty is imputed to Mr. Evans at this time. It is answered that though no cruelty is proved, yet there might have been acts of cruelty, which the prudence of the party, and a just regard to time and expence, have prevented her from now bringing forwards. It is within my recollection (and if it had not, I have been reminded of it) that in the original allegation given in this cause, she expressly pleaded, "that her original return to Europe was occasioned by his cruelty."—That assertion I directed to be struck out, because it was pleaded in a way so loose as to be incapable of proof; and therefore shewed that the party herself could have had no intention of proving it. It satisfies me, then, of this, that there was no disposition to suppress it, if it had been maintainable; because it is actually noticed in the cause. Taking then the whole together, I am supported by the testimony of all the witnesses; and I think I am also supported by what is full as good evidence, by Mrs. Evans's conduct in this suit, in saying, that no cruelty is at this period of time, viz. her first departure for Europe, imputable to Mr. Evans.

She arrived in England in October, 1781. She pursued the means of health; by medical advice; by travelling to different parts of Europe; by proper amusement; in all of which it is not denied, on the contrary, it is fully admitted that she enjoyed the most liberal assistance from the fortune of Mr. Evans. It is proved by his agent, Mr. Boehm, that the expence, during her residence in England, amounted to about £. 5600, which by a calculation rather, I think, unfavourable, has been made to amount to near £. 2000 a year. This certainly is a large sum out of a fortune that was making, that was not yet made;—it was in fact so large as to alarm the friends of Mr. Evans; and Mr. Boehm took a liberty, which I presume an agent does not often take, of remonstrating on account of the drafts. I think that in the deposition of Mr. Thackeray,

notwithstanding he deposes with the guarded and discreet tenderness of a relation, it is yet very easy to see that he hints at something like profusion on the part of Mrs. Evans; he says expressly, that she "was too generous, generous to a fault;" and a fault that certainly is, because the province of a woman, in matters of liberality out of her husband's property, is certainly extremely limited. She may be the almoner of her husband, but in the disposal of his fortune she is under very great restrictions. There is one fact particularly mentioned, which is, the lending a large sum of money to a Captain Barnwell; and I own that if I was to look sharp to find out the commencement of impropriety of conduct, I should be apt to say that I think I see the first speck of impropriety here attaching upon the conduct of Mrs. Evans; and one sees the folly, the imprudence of such conduct, in the event of this; for it *does* appear that this very Mr. Barnwell, to whom this money was lent, was the very first person to complain of her extravagance. It appears that Mr. Evans felt the impropriety of this, but he felt it in a way that an affectionate husband, a considerate man, would feel it;—he said to Mr. Griffith, that she had "spent a good deal of money, but that nothing gave him so much uneasiness in her expences, as the sum of money which she had lent to another person." However, though this produced some dissatisfaction, it produced no rupture; it was overlooked.

She sailed for Calcutta in December, 1784; she arrived in 1785, and there they remained until 1787. It is a little material to see what passed during this interval. They were visited by a Mr. Wood, a respectable person, who is examined as a witness on the part of Mrs. Evans. Mr. Wood does not give the slightest intimation of any disagreements in this family; on the contrary, he says, that his behaviour, "as far as he ever saw it, was studiously and affectionately tender." Mr. Maxwell, a person who was almost domiciled in the house, who dined and supped there very frequently, and was often upon parties with them, speaks likewise of their "living upon terms of the greatest harmony imaginable." Mr. Griffith, who was much in their company, "has no insinuation to the contrary" in the least. Mr. Hannay, who states himself to have been intimate, never heard the most distant surmise that he treated her improperly. Mr. Halhed, and other witnesses, speak to the same effect.—Why, then, taking the whole of this evidence one way, it is certainly evidence extremely strong; and if to this we add the total absence of all evidence the other

other way, I think myself warranted to say, that Mr. Evans's behaviour, up to this period, was in every respect unexceptionable.

Two facts, in particular, appear, which it is impossible not to notice; one is upon the evidence of Mr. Maxwell; and that is of Mr. Evans's going up into the country, at a distance from Calcutta, to Morshedabad, I think, or some other place, on account of her health. It may be said, there is no merit in that; any husband who had a sick wife would do as much; but, it must be allowed, she might have gone by herself: at any rate, therefore, there is great attention shewn in this instance of his personal attendance.

The next fact, and a very material fact it is in the cause, is this; that, purely to gratify her wishes and to consult her health, he quitted India; a country where he was almost naturalized, and where his prospects of avarice and ambition, at that period of time, were extremely inviting. He was then, as Mr. Maxwell says, *a senior merchant*. But, say the gentlemen, There is no great merit in that, *he had got enough*. Why, there is some merit in knowing that; it is a merit every body does not acquire; it is a proof of moderation, at least; and that he is not the *mean and avaricious person* which he has been represented to be; and, supposing he was that mean and avaricious person, still there is the more relative merit towards Mrs. Evans; because, if he was a man extremely fond of his money, and yet gave up his money on account of his wife, it is hard to say, that he had not some degree of fondness for his wife. Well, but say the gentlemen, His reputation was concerned. How so? She had already shewn that she could come to Europe without his personal attendance. I shall not then diminish the merit of so good an action, nor suffer it to be diminished, merely because it happens at the same time to be, what every good action is, a reputable one.

I am clear, therefore, that up to the time of the voyage, nothing material had happened to cloud the happiness of this family. The voyage itself; the application made for it by Mrs. Evans; the undertaking of this voyage by Mr. Evans, are all a security to me that the fact was so; for, if he had been the savage tyrant that he is represented to have been, it is clear to me that she would never have ventured upon such a solicitation with any idea of success; and it is equally clear to me that she would never have succeeded in it. Till this time, therefore, I see in the conduct of Mr. Evans nothing to blame; I see much to approve.

It is however upon this voyage, *malū ducit avi domum*, that change of conduct in Mr. Evans is first suggested to have taken place. It is not very well agreed what this change was; whether it was an indulgence of ungovernable sallies of ill temper; or whether it was a cool systematic plan of distressing his wife, by the most atrocious ill-usage: but certainly two things more inconsistent cannot be, than cool hypocrisy and wild passion. Now it is a strong presumption with me against the supposition of its being a case of ungovernable passions, that passions so inordinate appear to have enveloped themselves for the first time in the course of this voyage. If so, I think there must have been an alteration in the constitution of this man's mind; which is highly incredible. The material witnesses therefore resort to the other supposition. This is the turn given to his conduct by the great witness in this case, Mademoiselle Bobillier; namely, that it was "a crafty command of his passions; that every thing that he did visibly, was studied for ostentation; and that his passions were kept for a secret operation when nobody was by."

Now one cannot help observing, that taking it to be a cool deep-laid plan, to be pursued and carried into effect in secret way; the scene for the execution of such a plan is unhappily chosen as can be. Every body knows, that secrecy on board a ship is a thing not to be thought of. People cooped up in a ship live, and are forced, to live, in that state of miserable intimacy, which makes almost every thing that is done or said, known to every other person: there is for a time (a very unhappy circumstance it is) almost a suspension of every thing like personal delicacy; every word and every act is known to almost every body: how to suppose that a man in such a situation should first think of opening a plan of secret violence, one must first suppose, not only that he lost his temper in India, but that he had lost his common sense with it.

There are three witnesses only who are examined on this part of the case: there is Mr. Curry, a Mr. Humphry, and Mrs. Hartle. When the question is asked, Why other witnesses are not examined? the first answer is, That Mr. White is dead; the second answer is, That it is not more necessary to call witnesses on the one side than on the other: it to have called more, therefore, is, if any, an equal imputation on both parties. This latter answer might be some answer to the other party; might serve, in some degree, to stop their mouths; but it is no answer to the mind of the jury. In the next place, I say it is no satisfactory answer

to the other party; because Mrs Evans is the complainant, and she is the party who is bound to make out her case. But, to go farther, Is Mr. White the only witness who could have been adduced? Were there no other officers but Mr. White on board this ship? They have vouched indeed one female servant (it is an extraordinary thing that there should not have been more female attendants), a little black girl, whom they represent as too stupid to be examined as a witness; but I find also two men servants of Mr. Evans, who are vouched in the case, and who are likewise mentioned both in the libel and in the depositions. They would surely have been most important witnesses, if they had been produced; because they would have spoken a great deal to what has been described respecting the foul cloaths, delaying the breakfasts, and the nature of the several orders that were given to them by both the parties in this cause. However, it does happen, that the case is left utterly destitute of all the illustration, which it might have received from their important testimony.

Of the three persons actually examined, to be sure Mr. Curry, so far as situation and character are concerned, is extremely worthy of particular attention. He was a medical gentleman, who attended this lady during the whole of the voyage; whenever she was ill, she was under his immediate care. He swears, "that he saw her, and saw her in his professional capacity, every day during the whole of the voyage, three days only excepted, during which he himself was confined by indisposition." It has been well said by the counsel for Mrs. Evans, that a medical person is a confidential person; every thing affecting her health must unavoidably have come to his knowledge, it could not have escaped him. He gives an enumeration of symptoms; he applies a blister, about which Mr. Evans differed in opinion; and I think this gentleman shews a sensibility, more than enough, about the honour of this blister. He has his own resentments against Mr. Evans, and he candidly states them; yet I still think I do see enough in his deposition to satisfy me, that though he would not misrepresent nor exaggerate in the slightest degree, yet I think nothing that he knew of Mr. Evans's conduct, to his disadvantage, would be either much softened or at all concealed.

Mr. Humphry was a fellow passenger, but a witness of no particular intimacy whatever with either of the parties; I think he says, "that he was not in the cabin, in their particular apartment, during the whole of the voyage." He gives his opinion of Mr. Evans's temper and disposition; he

he thinks that it was "harsh and austere."—That however I am to take merely upon the credit of Mr. Humphry's discernment, for he speaks to no facts whatever; and I must remark, that observations made upon a man's temper, upon the temper of a landsman, during a voyage of six months, ought not to be turned very strongly to his disadvantage; for every body knows that a voyage of that length is no very great sweetener of any man's disposition, during the time that it lasts.

Mrs. Hartle is a witness, who appears to have lived in considerable intimacy with Mrs. Evans; but most clearly she lived upon very indifferent terms with Mr. Evans. She charges him with much personal incivility to herself during the voyage; and it appears that her resentments have since been sharpened by later indignities; so that she is, as Dr. Arnold has well described her, "a sort of co-plaintiff in the cause." I am to consider her therefore as deposing under the double danger of having inducements to take very strong impressions of facts to Mr. Evans's disadvantage, and of feeling no unwillingness to give such impressions their full force in representing them to the court.

The facts agreed to by these three witnesses are these:—In the first place, that Mr. Evans had procured, at a great expence, the very best accommodations a gentleman of fortune can have in a passage from India. So far all agree. And, in the next place, it is agreed, that she had of those accommodations (as it was highly proper she should have) the best share. Two of these witnesses, Mr. Humphry and Dr. Curry, are totally ignorant of any quarrels or disagreements, during the whole of the voyage. It is said, Mr. Humphry not being particularly intimate, his is merely a negative testimony;—however, for the reason that I have above stated, I think that a negative testimony, in such a case, is a strong testimony; because it is not possible that any act of atrocious outrage could have happened on board this ship, without its travelling to the knowledge of most persons on board. Dr. Curry's testimony is still stronger; his is not merely a negative testimony; he says, that, "as far as ever he observed, Mr. Evans's conduct was studiously affectionate." Now, his ignorance seems to me still more irreconcilable with the notion of this ill usage; because, it seems hardly possible that it could have existed without coming to the knowledge of a person who attended this lady constantly upon the occasion of ill health. It is still more irreconcilable with the notion of its being a fact within the possession of any third person; because, though some secret

ill usage might have passed between Mr. and Mrs. Evans, which was known only to themselves, and which, from a natural concern for their common reputation and quiet, they might not have divulged; yet it is very unlikely that if there were facts of outrage which got into the possession of a third person, that such facts should have rested there, and not have travelled farther.

There is, however, a third person on board this ship, Mrs. Hartle, who undoubtedly differs widely from both these witnesses; and upon her single testimony, the single testimony of an ardent witness, inflamed with resentments of her own, I am to take these facts, contradicted, as they are, by the silence, by the emphatical silence, of the two other witnesses; facts of a nature so atrocious, that they certainly have but little probability to support them, which can be founded on any argument arising from the general disposition of mankind, and which, from what I have stated in this particular instance, had no probability whatever, which is founded in the antecedent conduct of this gentleman.

The first fact which I shall observe upon is that most atrocious fact which is mentioned in the libel, article 6; viz. "That during the passage, Mrs. Evans being in a very low and bad state of health, and fresh air being absolutely necessary for her, Mr. Evans, with a wicked view to distress and increase her sufferings, refused to suffer, and would not suffer, a door to be kept open, or even opened at all, except when he wanted to pass in or out; that at the times he refused the benefit of the air to his said wife, he was not able to stay in the cabin himself during the exclusion of the air, but always retired to his own cabin, or some other part of the ship: and that once, when Mrs. Evans attempted to open the door to admit the air, she was prevented by Mr. Evans, who, with savage fierceness, seized her by both her arms, and, in great rage, with his utmost force and violence, threw her down three times, alternately raising her for that purpose upon some earthen gurglets, or vessels used for cooling water, and thereby very much hurt and bruised her, put her to great pain and anguish, and increased her illness."

The account given by Mrs. Hartle of this transaction, shews that even this account given in the libel is not at all overcharged. What she says is this: "That one morning, in their passage to St. Helena, the deponent and Mrs. Evans were in Mrs. Evans's room, walking towards Mr. Evans's room; that they observed him sitting there; that seeing them approach, he got up, and immediately went

“ to and shut the door of the cuddy ; that they were then
 “ under the Line, and there was not a breath of air stirring,
 “ and this deponent was extremely faint.” So that in fact
 the cruelty stated seems to be a cruelty that rather attached
 upon the witness than the party, and so indeed Mrs. Evans
 represents it ; for her application, according to Mrs. Hartle’s
 testimony, is this : “ Do, Mr. Evans, let us have the door
 “ open ; Mrs. Hartle is ready to faint.” She then goes on
 to say, that “ Mrs. Evans then went towards and proceeded
 “ to open the door ; that Mr. Evans, who was sitting with
 “ his legs up in an easy kind of posture, and was reading,
 “ then got up, and with a savage fierceness laid hold of both
 “ her arms, and then with violence threw her down, and
 “ she fell upon some earthen gurglets for holding water, which
 “ stood close by the said door ; and lifting her up again by
 “ her arms, with equal violence threw her down on the said
 “ earthen gurglets ; and she, the deponent, thought that by
 “ means thereof she was almost killed ; and being greatly
 “ terrified thereat, went out to send the black girl to her
 “ assistance ; that on going out she heard a noise, as if Mrs.
 “ Evans was falling a third time ; that she returned into the
 “ cabin, and found her sitting in a chair, her whole frame
 “ appearing convulsed, and her face quite pale ; that the de-
 “ ponent observed grasps of fingers on her arms, which ap-
 “ peared black and blue, and that the deponent had not be-
 “ fore observed such appearances on her said arms, and they
 “ appeared in parts of which Mr. Evans took hold, and, as
 “ she is well convinced, were occasioned by him ; that the
 “ said Mr. Evans, on his so throwing the said Mrs. Evans
 “ down, appeared in a very great rage, and he extended his
 “ mouth, and clenched his teeth in a revengeful manner,
 “ and his countenance quite changed with anger : and that
 “ the said Mrs. Evans appeared very ill and low for many
 “ days afterwards.”

Now, to be sure, this is such an act, that one can hardly
 find an epithet to give it its due character. It is, as has
 been said, a demi-murder, a murder more than half executed.
 It is an act not to be excused upon any sally of passion : that
 a man, on so slight a provocation as this, should three times
 knock his wife down (a woman of very tender health) in
 the way that is here described, is an act that does go to the
 very full extent of what the law must deem to be matri-
 monial cruelty. It is a fact of that atrociousness, that a
 court of criminal jurisdiction would pursue with the greatest
 vengeance ; and I need not add, that the common indigna-
 tion

tion of mankind would follow it to the latest period of the life of the offender.

Mrs. Hartle I cannot upon any idea suppose to be a person who comes deliberately to misrepresent; nothing looks like that. She is totally unimpeached as to general character; therefore *a priori* there is no reason why she is not to be fully credited. However, it is a good safe rule in weighing evidence of a fact, which you cannot compare with any other evidence to the same fact, to compare it with the actual conduct of the persons who describe it. If their conduct is clearly such as upon their own shewing it could not have been, taking the fact in the way they have represented it, it is a pretty fair inference that the fact did not so happen. If their actions, at the very time that the fact happened, represent it one way, and their relation of it, at a great distance of time, represents it another way, there can be no doubt which is the authentic narrative, which is the naked truth of the matter. Now, in trying Mrs. Hartle's narrative by that test, I think I do see enough to satisfy me, that she has deposed, I do not mean to say without principle, but she has deposed with passion: and that this is a very grossly inflamed representation, produced by repeated resentments, conceived partly on her own account, and partly on that of Mrs. Evans.

What is the conduct that any person of common sense and of common humanity would have adopted, who had been present at such a scene of infamous brutality as this is? Why, a man, be his powers of body ever so weak, that had the common spirit and feelings of a man, would have interfered, without the least apprehension of personal consequences to himself: but here there is a lady present; a friend of the suffering party: Is it credible, that she should be present at such a transaction as this, without raising a general alarm?—Not to do so, for the purpose of obtaining assistance, is an act of brutality almost as brutal as the act itself: it is really being an accessory after the fact. Why, without reasoning upon it, mere instinct would have compelled her to do so. Now, what does she do? Does she apply to Mr. White? Does she apply to any officer? Does she apply to the surgeon? Does she apply to any one person who have interfered with effect? There is not a man on board the ship, undoubtedly, who would not have lent a willing hand. Mr. Evans would have had good luck if he had not been voted into the sea, by general consent, upon such an occasion as this. Instead of this, what does she do? Why, she runs out, and sends in the little black girl, who

they tell me, at this moment is too stupid to be examined as a witness; she sends her in to rescue this poor lady from the hands of this tyrant; and thus discharges the office, it seems, of a good friend, of a good Christian, and of a human being.

What is done afterwards? Her friend is extremely weakly; is attended constantly by a medical person; and, as she swears, "is made ill for many days in consequence of this treatment;" yet this lady does not communicate one syllable of the matter to the physician, who was so much concerned to know it, and whom she saw every day; he is in total ignorance of all that has passed.

The counsel on the part of Mrs. Evans have very properly reproached Mr. Evans with cruelty, for not having communicated to Mr. Paumier the unhappy habit of intoxication, with which he has charged his wife. They say, it was his duty to have done it, as undoubtedly it was. Then what am I to think of the conduct of Mrs. Hartle, upon this occasion? She was a person who was certainly under no restraint from any partiality to the defendant; directly the reverse. It is a behaviour, in my apprehension, so totally unnatural, under such circumstances, that I am satisfied such circumstances could not have existed. But, what does she do when she comes to England? What would any body have done in such a case, with common reflection? Why, clearly, have advertised the family, not maliciously, but confidentially; would have put them upon their guard; would have told them, that, with all the speciousness of manners which this gentleman assumed, she had been witness to a scene of horror, which shewed him to be a most intolerable tyrant. Not a word of all this passes. She visits regularly, upon the invitation of this very gentleman, as if nothing extraordinary had happened, and the family remained perfectly uninformed. I rely for these facts upon the testimony of Mr. Thackeray; for, how is the continuance of this gentleman's good opinion any way consistent with his knowledge of this fact? or, how is his ignorance of the fact consistent with the knowledge of it by any one of the family? I have all the reason in the world, therefore, to believe that the disclosure of this fact took place very recently before the commencement of this suit.

Let us now see the conduct of Mrs. Evans under all the pain, and all the terror, which such a situation must excite. No alarm is given by herself; yet in the account given by her of attacks made at other times, she pleads and proves that her *piercing cries* brought people from all parts of the house.

house. Mere animal nature would have made its appeal to the ordinary feelings of other people: she *must* have done it; nobody could submit to be murdered in this sort of way in silence. Yet I hear nothing of any cry of distress; it does not appear that a single person was collected by any expression of pain or suffering. She is equally silent before her coming to England: not a word to the physician in attendance; not a word upon her coming home to her own family. It is said, that all this was tender dissimulation for the character of her husband. That seems to me to be very hard to be conceived. I have been put in mind of Lady Strathmore's case, where a continued series of ill usage, for years together, was kept from the knowledge of every body, but three or four people: but then I must take along with me this fact, that the gentleman charged had taken every precaution to preclude a possibility of detection; for he had planted his own creatures about her: and the very first opportunity that she had of disclosing her real situation, the business blew up immediately. There was, I remember, in this Court, the case of Mrs. Prescott: that was a case, to be sure, of a person who had suffered as atrocious ill-treatment as one human being can receive from another, and she bore it with great, with wonderful resignation. But this was proved in that case, that she did not keep it entirely unknown to others; she implored the protection of her father, whenever she was ill-treated; she communicated it to medical persons; not a word of harshness in the style of her complaint; her complaint to the Court was conceived in strong language, but it was in language more expressive of sorrow than of anger: but still there was no dissimulation. Now I do not conceive that Mrs. Evans would have been less prompt to complain than Mrs. Prescott was. I have looked into the libel in the present case, which certainly does appear to me to be drawn with sufficient acrimony; I have looked into the personal answers, and I cannot help saying, that these personal answers are written with full as much passion as prudence: I do not see in these answers the marks of that perfect resignation which is so much contended for. I do not mean to say, Mrs. Evans appears in her conduct in this suit, or in any paper produced, to be a person who would assert her rights improperly; but I do say this, that she appears to me to be a person who would not dissimble her injuries in a way beyond all example, beyond all propriety and all reason.

T H I

L A W Y E R ' S

A N D

MAGISTRATE'S MAGAZINE,

For NOVEMBER, 1790.

SENTENCE *delivered by* SIR WILLIAM SCOTT,
in the CONSISTORY COURT, *in the* CASE
of AUGUSTA EVANS, *the Wife, versus*
THOMAS EVANS, *Esq. the Husband,*
July 2, 1790.

THEN, taking the fact upon this view of it, I feel no hesitation in saying, that what I collect is this:—that there was something of a struggle, how arising I don't know, but it was a struggle of no consequence; and that is the important point. If it had drawn consequences after it, there must have been other witnesses; and the witness who was there would have acted otherwise. It must have been therefore a trifle, and in being coloured as a matter of importance it has received an undue colour; the basis of the fact is extremely slight, and all beyond it is colour—is exaggeration—is passion.

Having disposed of this great leading fact in the voyage, I shall dispatch in fewer words the other facts which are charged: in the first place, because they are, compared with

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this

this fact, very slight; in the next place, because they stand upon the single testimony of Mrs. Hartle, who, in my opinion, has taken a very undue and extravagant impression of the whole business.

There is another charge, which is so strong a proof of this, that I shall notice it for no other purpose than to exemplify the strong bias of this witness to make mountains of mole-hills. I mean her evidence upon that article which charges the business of the noises. It is pleaded, "That while Mrs. Evans was in a very weak and sickly state, Mr. Evans accustomed himself, in the most unfeeling and cruel manner, to distress her and increase her pain, by making a violent noise with a hammer close to her."

I had very great doubts about admitting this article. I admitted it upon an idea suggested naturally enough by the words, that this gentleman came, without any reason whatever, with a heavy maffy instrument, to make a loud noise quite close to the head of a very sickly and infirm person. These are the ideas which that article, worded as it is, certainly excited in my mind. I do not believe that it could have entered into the conception of the most ingenious person in this Court, to have imagined how this would have ended: to have imagined that it should end in this gentleman's cracking almonds in an adjoining room with a hammer (which, being proper for such a purpose, could be no very ponderous instrument) and his afterwards coming to eat them in his wife's apartment. I do protest it is so singular a conceit, that if I did not see a great deal of unhappy seriousness in other parts of this cause, I might rather suspect that some levity was here intended against the Court. I am sure of this, that if a man wanted to burlesque the ecclesiastical courts, he could not do it more effectually, than by representing that such a Court had seriously entertained a complaint against a husband, founded upon the fact of his having munched almonds in the apartment of his wife.

Another offence charged is, that he obstructed the circulation of air. Now, certainly that may be cruelty, because health may be affected by it: life may be destroyed by it. Here again I look, in vain, for the testimony of the physician. It is pleaded expressly, "that her complaints were much increased by it." In the libel it stands thus: "That Mr. Evans, with a wicked view to distress and increase her sufferings, refused to suffer, and would not suffer, the door to be kept open, or even opened at all, except when

he went in or out." Now, any body would suppose that his door was kept obstinately shut during the whole voyage, except when he went in and out; and that this poor lady was shut up in an apartment from which the common element was excluded. Now, how does it turn out? Mrs. Hartle, herself an invalid, chuses to reside almost constantly in this apartment; her account is, "that he often shut to the door; sometimes the cuddy-door" (which I take to be the external door, in consequence of which he would suffer the inconvenience in common with themselves); "that at other times he would shut the inner door, between his apartment and theirs; and this," she says, "he did without apparent cause," that is, without a cause apparent to her. Now, am I therefore to presume, that because there was no cause apparent to her, that there, therefore, was no real cause? Am I to call upon a gentleman, at the distance of two or three years, to shew a reason why he shut a door; merely because another person chuses to think (it is conjecture and inference merely) that he did this for the purpose of plaguing his wife? Were there no calls of private convenience? Were there no calls of private decency, but Mrs. Hartle was to be previously informed of them? Were there to be no moments of privacy from his own wife, much more were there to be none from the wife of another gentleman? It is said, that in the fact particularly alluded to, he was reading at the time—Why, is a man to be bound down so strictly to time, that he must put on his clean shirt the very moment of his shutting the door? That he is not to be permitted to take up a book, even for a few minutes? It is said, by way of aggravation of the cruelty, that "he himself did and could walk out upon the deck." Why could not the ladies do the same? If he did shut the door, they could have opened it with as slight an effort as he shut it. Is it pretended that he locked the door? It has been contended that he did; but if he had locked it, they had still another retreat, for, as I understand the evidence, their cabin had a door opening to a gallery, communicating with the open air. But, supposing some inconvenience was actually produced, yet, in order to make cruelty, I must affect him with a knowledge that it would have that effect, and in a painful degree: for, unless they were that he was perfectly sensible of that, namely, what the number of necessary inlets for air was: there is nothing so cruelly in the case. How is he to know, more than Mr. Curry, who is convicted of a gross mistake respecting the subject? He describes the number of doors and win-

dows, and, amongst the rest, the door which led into the apartment of Captain White and the officers; and then goes on to say, "that if any one of these doors or windows leading into this (Mrs. Evans's) apartment were shut, the circulation of the air would be obstructed in a very high degree." Now, the fact proved to me by Mrs. Hartle in this case is, "that the door which led into the apartment of Captain White, was kept shut during the whole of the voyage, except only three days; and that it was so kept shut at the particular request, and for the particular convenience, of Mrs. Evans." What reason have I to say, then, that Mr. Evans knew the consequences of opening or shutting one inlet of air, when I find a medical person, perfectly well acquainted with the apartment, lying under so total an ignorance with respect to the very same particular?

The article of foul clothes was another article which was admitted merely upon the ground of its being associated with other articles of more weight: because, where there are articles of great strength in their own nature, the Court is always less delicate about admitting slighter articles, which it would not have admitted singly and standing by themselves. To be sure, it might be a cruelty, if, as described in the libel, he brought large collections of loathsome clothes, in a very hot climate, into the apartment of a person extremely sick, without any necessity for it, or without any signal convenience. Either this necessity, or some signal convenience, would justify it; and it must be shewn that there was neither; for certainly I shall not presume it so, in order to make it out to be cruelty. Now, what is proved in this case? These foul clothes hung at first in the quarter-gallery. Upon a suspicion entertained by Mr. Evans (whether right or wrong is utterly immaterial) that these clothes were pilfered by Mrs. Hartle's black servant, they were removed into his own room, where they generally remained; sometimes, as Mrs. Hartle says, "for near a month." He therefore had the general inconvenience of them; and it certainly is to me a pretty strong presumption, that he did not conceive these bags to be bags of poison, when he made his own room their ordinary station.—Mrs. Hartle says, "that they were from thence occasionally brought into Mrs. Evans's room," which being a larger room, they undoubtedly could not be more offensive than they had been in his smaller room. She says, "she has seen him bring them in, and his man Oliver assist in sorting them." In order to be sorted they must be spread, and accordingly they were spread. Now, what his

hindered the ladies from retiring during this operation? And it has, besides, been justly observed by the counsel, that in such situations as these a great deal of accommodation must be practised. Every body who has been in such situations knows, that he must submit to a great deal that is very loathsome; and he must perform a great deal that is very servile. But, however, she says, "they were removed before dinner:" and supposing that the smell did not entirely remove with them, who had the most of it? Undoubtedly this gentleman had not been upon a bed of roses all the time, according to their own account of the matter. But, all this "could not be for convenience," she says. Why? "Because he used to spread them, under a pretence of fortifying them." Why, has not she herself proved in her deposition that "he actually did fort them, and that she had seen both him and his man Oliver employed in that operation?"

Another cruelty is that respecting the denial of breakfast, which is charged in the seventh article of the libel; and it is charged thus: "That she used to give orders to one of Mr. Evans's servants to boil her tea-kettle, that she might get her breakfast early, as necessary for her health; not only on account of a blister on her side, and a burning thirst that then afflicted her, but also by reason of her being then pregnant; at which times Mr. Evans positively refused to suffer, and would not suffer, his said servant to boil her tea-kettle, and thereby deprived her of the means of satisfying the cravings of nature, and obliged her to resort to drugs for relief."

Now the proof of this last consequence, of her resorting to drugs for relief, is this, that "one morning Mrs. Hartle saw her take some pills; but that those pills were specifics against the want of a breakfast, or had any connection with the want of a breakfast, there is not the least suggestion. In his case, the men servants to be sure would have been the satisfactory witnesses; because they could have spoken to the orders that were delivered on both sides; to the orders given by Mrs. Evans, and to the orders given by Mr. Evans. But all that I can find upon this article is, that Mrs. Hartle positively swears, "she knows of no general orders given to the servants not to boil the kettle." I find also from her, that "Mrs. Evans did send, upon several occasions, about eight o'clock, to her for tea." I find, on the contrary, from Mr. Humphry, "that he generally saw, every morning at eight o'clock, the servant going with the tea-kettle:" and therefore it is no unreasonable presumption

sumption surely, that an omission of any one morning of a punctual attendance at that hour, might be the effect of some accident, or of some particular inconvenience.

It is true indeed, as I find from Mrs. Hartle, "that she one morning heard Mrs. Evans desire Mr. Evans, whilst dressing, to let one of his men servants come to get the breakfast, and he replied he should not come," but I do not find from Mrs. Hartle, that this application was made under a representation of some particular urgency or distress. It amounts to no more than this; that the servants were at that time engaged about his person; that she desired one of them might come immediately, and he refused. This might be uncivil, or it might not: that depends upon the manner of the refusal; upon the delay interposed; and upon the occasion that was at this time occupying the attention of the servants. But I shall not hold this to be decided cruelty, till I am first satisfied of this position—that if a husband is employing his servants about his own person, he is, upon the very first summons, to detach them on the commands of his wife; and that if he declines this, the very instant that it is required, it is not only an incivility, but that gross inhumanity for which the law will grant relief.

There is one charge of a graver complexion, and that stands in the tenth article:—"That one evening, whilst the ship was in her passage, and whilst Mrs. Evans continued in a very weak and sickly state of body, pregnant, and scarce able to move, and being desirous to go to bed, she called to Mr. Evans, who was in an adjoining cabin with two of his men-servants, desiring he would send one of them to unlash her cot, that she might go to bed; but that he positively forbade his said men from following her directions, and she thereupon called a little black girl to assist her; upon which Mr. Evans ran into Mrs. Evans's cabin, and in great rage and anger pushed the said little girl away, and, with great fury and force, gave Mrs. Evans so violent a blow or push as drove her to the further or other end of the said cabin, and laid her prostrate on the floor, where she remained a considerable time without being able to rise, and thereby greatly hurt and bruised her, and put her in great peril of her life: and that Mr. Evans, without regarding the helpless situation to which he had reduced her, with the greatest indifference retired to his own cot in the next cabin, and from thence uttered the most shocking and abusive oaths and imprecations against his said wife."

Now

now there are three witnesses who are vouched in this article, who certainly could have proved a very considerable part of it; they are, the two men-servants, and the black girl. It stands however a naked charge, without proof, or even an attempt at evidence;—a charge in itself almost of direct murder, and subject to all the observations which I have made, upon the impossibility of such a crime escaping notice; and yet not a single witness is produced to it! Surely it is not a sufficient apology in such a case to say, that it is a misfortune that it could not be proved; because it is a misfortune which must have been fully known, I apprehend, to the party, at the time she inserted this article. And I must say, that to enter on the records of the Court with an accusation of so grave a nature, without calling one witness to support it, is taking something of a liberty with the Court, and is a pretty gross one indeed with the person who is the subject of such an accusation.

Upon the whole history of the voyage, and the facts contained in it, I find myself compelled to say, that I have no evidence which satisfies me, that Mr. Evans has acted in the voyage in a manner inconsistent with the duties, and obligations, of a husband. If he had so done, it is impossible that there must have been ample evidence; on the contrary, a great part of the evidence is absolutely irreconcilable with the notion of such misconduct having been proved. The evidence that does support it comes from the mouth of a person, who is in a great degree disabled by her prejudices.—But let me not be understood to insinuate, that his witness comes forward to deliver a false testimony. I am firmly persuaded that she believes every word she says; she trusts to her resentments, rather than to her recollections; she brings with her sincere intentions, but she does not bring a dispassionate mind; she does not bring moderation, and that sobriety of mind, which belong to a witness deposing in a Court of Justice, upon matters by which the character of another individual may be so deeply affected.

The voyage ended in the middle of September, she believed, I think, as was observed by Dr. Laurence, not to be three months pregnant; and about six weeks of this time had been spent upon the voyage from the Western end of the Channel; so that the pregnancy is proved, I think, to have been in such a state of incipency, during some of the facts spoken to, that it

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cannot be understood to make any material ingredient in the cruelty.

Upon their arrival they were received, as far as appears, with affection, and with politeness, by their friends on both sides. Nothing transpires of all these horrible businesses, which happened on board this ship. Mr. Evans is proved by Mr. Thackeray to have then possessed his good opinion, and that of other persons of his family.

Now, what is Mr. Evans's behaviour upon his arrival? In three or four days he invites Mrs. Hartle, a person not very acceptable to himself, but the friend of his wife; he likewise desires Mr. Paumler to give her all necessary attention, to give her every possible attention during her illness. He soon after goes over to France with her, where he engages in his service a Mademoiselle Bobillier, a young Frenchwoman, at the express request of his wife: they return, and they settle in Bond-Street. Mr. Thackeray, to whom I very much adhere during the whole of this business, says, "That Mr. Evans's general conduct and behaviour to Mrs. Evans was very attentive; and that he saw nothing improper therein, till near the time of her lying-in:" he admits too that Mr. Evans supplied her liberally with money till almost the time of the unhappy separation.

The evidence of this Bobillier is, "that she herself never was a witness to any quarrel between them;" but "that," she says, "was mere craft on his part; for she infers, from tears which she has found Mrs. Evans in (and the counsel have laid much stress upon these tears) that there must have been secret ill treatment. I own, that tears, in the case of a very nervous person, do not seem to me to lay the foundation of any very conclusive evidence one way or the other.

In January, going to a ball at Mr. Hastings's, she had, somewhere or other (I think it is not clearly proved where) the accident of a fall. It is spoken to by a great number of witnesses on both sides. This fall was not the occasion of much immediate injury, as far as appears: this appears however from many of the witnesses, that upon that occasion Mr. Evans acted with a very laudable tenderness. He carried her up stairs in his arms. He applied to Mr. Paumier to recommend a doctor, having his apprehensions of the consequences which it might occasion: Dr. Denman was the person who came. And it appears that she actually did miscarry within three or four days after this fall. To be sure,

the argument of *post hoc, ergo propter hoc*; that because the miscarriage immediately followed, therefore it was occasioned by that which it followed, is not a very conclusive one; for it is no very easy matter to trace a misfortune of this sort to a precise cause, and with such exactness as to say that, either in the whole or in part, it was owing to the fall, and to nothing else.—But, however, this at least is clear, that to her nurse, Mrs. Tate, a confidential person, most certainly, Mrs. Evans did herself ascribe her miscarriage to that accident. It certainly is not improbable, though no immediate injury had happened; because, as it is generally understood, fright, alarm, and agitation of spirits, frequently do precipitate such matters; and what makes it more probable in this instance is, that it is in proof that this lady was in the habit of miscarrying, for it is proved she had had two miscarriages before her return to Europe.

Yet, in her libel, Mrs. Evans herself has ascribed the miscarriage to a very different cause, for it is pleaded, that “it was occasioned wholly by the pain, anxiety, and terror that she was continually in, from the cruel treatment of “Mr. Evans.” I have above stated, what Mr. Evans’s *visible* conduct was from Mrs. Evans’s own witnesses; from her own family; from persons of honour and of caution, and who certainly would not have dissembled it, had it been otherwise.—What was not visible must be merely conjectural; and, in my apprehension, very perversely so, if it is to be represented as opposite to that which was visible. To what this miscarriage was imputable I do not pretend to say; but I do say, that it was not owing to the cruel conduct of Mr. Evans: because, if it had, it is most perfectly clear, that such conduct must have been proved. Now, to whom is it known that Mr. Evans was the author of that miscarriage? Why, to one witness only. To Mademoiselle Bobillier, a young woman of the age of twenty-five, who does take upon herself positively to swear—that “this premature delivery” (I use her own words) “was entirely occasioned by the unkind behaviour of Mr. Evans to his wife, and for want of proper attention to her during her pregnancy.”

As this witness makes a pretty conspicuous figure in this cause, it is necessary to consider a little who she is. Her deposition, upon the face of it, is highly coloured and inflated; very descriptive; full of image and epithet; something in the style really of a French novel, of the trash of a circulating library. At the time of her giving in her deposition, it is also in proof that she had had a pretty acrimonious

monious suit with Mr. Evans. She is a young woman, who having been first known to Mrs. Evans upon her former excursion into France, was on this second excursion, taken into the family as a governess; and was brought to England in November; she therefore was in the service only two months of the pregnancy, and she most positively declares, his visible behaviour to Mrs. Evans was perfectly proper during the whole of the time.

She appears to have been on terms of great intimacy and confidence with Mrs. Evans. I need not observe upon the abuse that is too frequently made of that sort of situation. — Female friendships are often hazardous, in the case of married women, but, of all friendships, humble friendships are the most dangerous. The humble friend has an obvious interest in falling in with the present humour; in creating and in inflaming differences between the husband and the wife; in acquiring importance to herself by being a sort of third estate in the family. I own I cannot but think that it has been a very great misfortune to this family, that this person ever became a member of it: for in this I am clear, that if she aggravated matters, in her reports to Mrs. Evans, only half of what she has done in her reports to me, she has employed an activity that has been most fatally successful in troubling the repose of this family.

To be sure it is a monstrous proof of an intention to exaggerate beyond all decency of appearance, that this witness, who had been little more than two months in the family, takes upon herself positively to say, "That this miscarriage was owing to her being kept, during the whole 'period of her pregnancy, in a state of persecution.'" Taking this assertion in the most qualified way, it is a very unwarrantable assertion, undoubtedly, for the witness to throw out. What possible confidence can I then have, that any thing she says is true, when I find her swearing at random to what it is impossible she could know, whether it be true or not? The fact is, she is not supported by any one witness in the case; there is not another witness examined, on the part of Mrs. Evans, who refers the miscarriage to the same cause. Mrs. Thackeray makes no reference of it to that cause; Mrs. Evans herself makes no reference of it to that cause; she refers it in her conversation with Mrs. Tate, to another cause entirely: to Dr. Denman, and to Mr. Paumier, she does not pretend to insinuate that it is the effect of any such ill-treatment. And as to his want of attention to her, which is stated by this witness, it is most positively

positively contradicted by the person who must know it best; that is, by the very apothecary who attended her, and who speaks, in the strongest and most unreserved terms, to the care and attention shewn to her by Mr. Evans.

The libel pleads, in the eleventh article, to this effect:—

“ That after the arrival of Mr. Evans and his wife in
 “ England, and whilst they resided in Bond-Street, she was
 “ delivered of a seven months’ child; which premature birth
 “ was wholly occasioned by the pain, anxiety, and terror
 “ she was continually in, from the cruel treatment of Mr.
 “ Evans; and that whilst she was in labour he barbarously
 “ refused to call any assistance to her; and when, at last, as-
 “ sistance was had, he obliged her attendants to leave her,
 “ when he bolted the door upon her, and detained her from
 “ them for more than an hour, notwithstanding the pains
 “ of labour were then severely upon her, and her life was
 “ in imminent danger, for want of assistance: and that after
 “ her delivery, she was for six weeks, or thereabouts, con-
 “ fined to her room, in a very low, weak, and languishing
 “ condition, and her life was despaired of; notwithstanding
 “ which, Mr. Evans greatly disturbed, harassed, and tor-
 “ mented her, by frequently making great noises, and by
 “ knocking and thumping in her bed-chamber, and thereby
 “ preventing her from taking any rest; and also by suffering
 “ and allowing his men-servants to make great uproars and
 “ disturbances, when intoxicated, over her head; all which
 “ endangered her life.”

Now here we are agreed; the council on both sides con-
 cur in the atrocity of this conduct; because, if it be true,
 that he treated his wife in this brutal manner, in an hour
 when every animal and every moral feeling called for his
 tenderness, he is one of the most disgraceful exceptions to
 human nature that one has ever heard of; a more enormous
 conduct cannot be figured by the imagination; thus to at-
 tempt the life of his wife, and the life of his own infant, is
 a cruelty that out-herods Herod. It is impossible that the
 friends of any woman should suffer him to live one minute
 afterwards with her, if they were not destitute of common
 sense, as well as common humanity.

Bobillier is the principal witness upon this article. I had
 almost said the only witness; and I am satisfied that the
 account which she gives is utterly discredited, even by her-
 self, as well as by the other witnesses who are vouched for
 this article.

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The account that she gives is this;—That “in the month of January, 1788, she was delivered of a seven months’ child which premature birth was entirely occasioned by the unkind behaviour of Mr. Evans towards his wife, and for want of proper attention being paid to her by him during her pregnancy; she having been constantly kept, during the whole period of her pregnancy, in a state of agitation of mind, by the teasing contradictory behaviour of her said husband, who never suffered her to have a minute’s peace, and who always took occasion to quarrel with her from the most trifling occurrences. That, about two o’clock in the morning of the day on which Mrs. Evans was so brought to bed, Mr. Evans came into the deponent’s bed-chamber, and, having awoke her, he told her that Mrs. Evans wished to speak with her.” (This is the proof that this gentleman barbarously refused to call assistance, when he was the very first person that got up and went into the apartment of this confidante, and for this express purpose.) “She went into her apartment,” she says, “and then gave her such linen as was necessary for her situation.” What she means by that expression is not very clearly to be understood, because it is most clear from what follows, that she had not any idea that at that time Mrs. Evans was going to miscarry; for she goes on to say, that “neither the deponent, nor Mrs. Evans, as she verily believes, had then any idea that she was going to miscarry; the pains she suffered, and the symptoms attending them, being entirely different to what the deponent understood had been the case on her first lying-in: that Mrs. Evans then informed the deponent of her having made Mr. Evans acquainted with what she felt, and the deponent verily believes that he well knew that his said wife was then in the pains of labour, and going to miscarry.”—That is to say, these two women, this woman of the age of twenty five; the other lady who had had children, and who had twice miscarried before, have no suspicion of what is going to happen; but, for the purpose of making out an act of cruelty, he is to be affected with the knowledge of this circumstance, with the knowledge of a fact, of which these two women, as she declares, were themselves utterly in ignorance.

She goes on to say, that “he desired the deponent to return to her apartment, and said that he would give her notice if she became worse; that Mrs. Evans then told the deponent, that she wished her to stay by her; but
“Mr.

"Mr. Evans having expressed his intention to abide by her
 "himself, Mrs. Evans did not dare to insist on the depo-
 "nent's continuance with her, for fear of the resentment of
 "Mr. Evans."

That her continuance was pressed is not at all stated. Mrs. Evans desired she might stay; her husband said he would stay, in order to give notice if the intervention of any other person was necessary. This desire, from what appears, was immediately given up, and this woman accordingly returned to her own bed-chamber. "About seven
 "o'clock on the following morning," she says, "she went
 "into the bed-chamber of Mrs. Thackeray, the sister of
 "Mrs. Evans (who was then on a visit to her) whom she
 "acquainted with what had happened in the course of the
 "night." I think she would have acted at least with as
 much prudence, if she had done this at the very moment
 when she had been summoned by Mr. Evans. She how-
 ever acquainted her then with what had passed, and Mrs.
 Thackeray instantly said, "she was sure her sister was going
 "to miscarry, and she immediately got up. Mrs. Thacke-
 "ray then sent for Mrs. Webb, the mother of Mrs. Evans,
 "and Dr. Denman; they both came about half after ten
 "o'clock in the morning, at which time," Bobillier goes
 on to say, "Mr. Evans was still in the bed-chamber with
 "Mrs. Evans, and had not himself given any directions
 "whatever in regard to her, although fully aware of her
 "dangerous situation;" in short, that he remained so many
 hours perfectly cognizant of the situation of his wife, with-
 out giving any directions with regard to her.—Now let us
 enquire what Tomlins says on this part of the cause. But
 I must first take notice, that Tomlins is the waiting-maid
 of Mrs. Evans, and a witness who is examined on her side;
 yet she is a witness whom they have not thought fit at all
 to examine to this matter of the lying-in. All that she de-
 poses on the subject comes out upon the interrogatories put
 by Mr. Evans. In the next place I must take notice, that
 there is another person, and that is the nurse, who must have
 also been cognizant, and in a very informed degree, of every
 thing that passed; and it is a circumstance that cannot escape
 the observation of the Court, that this nurse is not at all pro-
 duced on this side. Why it is impossible but that these two
 persons must have known every thing that happened upon
 this occasion.

Tomlins, however, is examined upon interrogatories as
 to this fact; and what she says is this; "That in the morn-
 "ing the house-maid told her, that Mrs. Evans had been

"ill ever since three or four o'clock in the morning; that she, the respondent, going up between eight and nine the same morning, found Mrs. Evans in bed, crying; when she told the respondent she was ill, but knew not what was the matter with herself; but the respondent, from the account she gave her, thought she was in labour; and the respondent almost immediately went down and told the circumstance to Mr. Evans; who desired her to send for the doctor as quick as possible."

Then it is proved by this witness, that at this time Mr. Evans was down stairs, though Bobillier positively swears that he was shut up in the room with her till between nine and ten o'clock. He was then down stairs, and, upon the first intimation of an opinion given to him that she was going to miscarry, he did immediately order a doctor to be sent for as quick as possible. That he had not himself given any directions with regard to her, where is the wonder? Why, were there not women in the house, upon whom that office naturally devolved? Mrs. Thackeray, her own sister, was in the house. Why, is it to be understood that on such occasions it is a duty which adheres so close to the character of husband, that it cannot by any possibility be discharged by deputy? Is it to be insisted that it was his duty, and his duty alone, to give such directions himself; and that it is a crime in him that he relies upon the discretion of the persons about her? This is such an imputation that would affect the character of almost every married man, if it was permitted to weigh for one single moment. However, "he then came out of his bed-chamber, as Bobillier says, "but not before the arrival of Dr. Denman." She says, Mrs. Evans told her a great deal of conversation, and, "taking hold of her by the hand, begged her not to leave her any more." (This is one, amongst many, of the proofs of that sort of unhappy intimacy, I think, which subsisted between these two persons.) She goes on to say, "that Dr. Denman being afterwards introduced, immediately told Mr. Evans, Mrs. Webb, and Mrs. Thackeray, "that she was going to miscarry; and the said ladies last mentioned thereupon sent for a nurse to attend Mrs. Evans, but Mr. Evans gave himself no concern about it." Why, what concern was he to give himself about it? The doctor was called, and the nurse was called. What then remained for the husband to do? I should have been glad to have had it stated, by either of these ladies, what the proper or possible conduct of a husband in such a situation should have been.

Bobillier then goes on to say, " That he afterwards burst
 " into the room in a very abrupt manner, so as greatly to
 " alarm and terrify Mrs. Evans, who was then in the pains
 " of labour, and said, that they had got his tea-pot ; which
 " was immediately sent out to him." Mrs. Thackeray
 mentions, to be sure, the same circumstance of the tea-pot ;
 but not one word of this abrupt manner, which had the
 effect of frightening this poor lady, in this situation : all
 that she says is, that " he put his head into the room, made
 " enquiry after his tea-pot, but made no enquiry after Mrs.
 " Evans." This then is the whole of the cruelty ; that
 when he came, having some particular fancy for this tea-
 pot, which, perhaps, was not in particular use at that time,
 he desired to have it out, and retired without at that moment
 making a particular enquiry after his wife.

Another fact of cruelty is, " that he refused the nurse the
 " elbow-chair."—That, every body knows, is one of the
 high prerogatives of these ladies, upon such an occasion ;
 and one would have expected, that the nurse herself would
 have come forward, with no little acrimony, on such an ac-
 count : but, on the contrary, she is examined, and I don't
 find that this circumstance of the elbow-chair has made that
 impression upon her mind, which it seems to have done
 upon that of Mademoiselle Bobillier.

I come now to that which is the most atrocious fact in
 the cause, and a most atrocious one it is—that after it was
 fully ascertained, that this lady was going to miscarry, this
 gentleman turned out the attendants, and kept this un-
 happy lady by force, with the pains of labour then upon
 her, to the manifest danger of her own life, and to that of
 his own infant, and kept her shut up, absolutely excluding
 all sort of assistance.

This is what is positively sworn to by this Mademoiselle
 Bobillier. I own, upon the face of it, it is a thing grossly
 improbable ; knowing, as every man does, the natural and
 the reasonable warmth of women respecting a business of this
 nature—the delivery of another woman. I think, therefore,
 it is impossible but that, if a barbarity of this nature had
 passed, nothing could have stopped the women who were in
 the house from making their immediate way to the assistance
 of this lady ; and I am very sure, that nothing would have
 stopped them from making their way to this Court, to give
 a representation of what had happened. There is not a
 single witness who comes forward to say one word about it ;
 and yet the nurse has been examined, who is stated to have
 been in the outer apartment, and to whom it is positively
 said.

said to have given great uneasiness; Bobillier's words being, "to the great surprize and disappointment of her mother, " of this deponent (Bobillier) and of the nurse, who was " uneasy thereat, for fear of the bad consequences which " might attend the delay."

Now, what the nurse says is this, That she has every reason to believe, that Mrs. Evans was, during her lying-in attended by proper persons, and had proper assistance, comfort, and support; that she has seen Mr. Evans several times carry his wife in his arms, and treat her with great tenderness and affection; that " she knows not that the premature " birth was occasioned by the ill-treatment of Mrs. Evans " by Mr. Evans, and never heard the same while she continued to attend her, and never witnessed any ill-treatment of him towards her. That Mr. Evans did not in " her presence, or to her knowledge, when she was in labour, refuse to call any assistance, or oblige her attendants " to leave her, or detain them from her, nor was her life " in danger for want of proper or any assistance." This then is the account given by this nurse, who is vouched as a person upon whose mind this transaction made this deep impression.

Bobillier goes on to say, that " she verily believes that the " life of Mrs. Evans was in danger by the cruel behaviour " of Mr. Evans towards her, as well during the night preceding the delivery, as during the time she was locked up " in the room."

I have, in opposition to that, the evidence of Frances Tilbury, who was the house maid; of Mary Tate, who was the nurse; of Mary Mayall, the wet-nurse; of Dr. Denman, and of Mr. Paumier; and I ask if it is possible that all or any of this could have happened, and that not one of these persons should speak at all to the matter? Is it possible that they should have given a representation of it so totally inconsistent? But look at the conduct of the parties in this case. What is proved? Why, undoubtedly the mother, who had come at this time; undoubtedly Mrs. Thackeray, who was in the house at the beginning, must have fired with indignation upon such an occasion. But there is nothing of this sort intimated in the evidence of Mrs. Thackeray. The account she gives is simply this:—That " she was at Mr. " Evans's in January, 1788, and then saw her sister, Mrs. " Evans, and staid there with her four days; that Mrs. " Evans then spoke of her expecting to be delivered in two " months from the said time; but that on the last morning " of her being there, the deponent understood Mrs. Evans " was

" was very ill, and was in bed with Mr. Evans; and, being about seven o'clock in the morning, the deponent was alarmed by the account, and desired of the servant who told her of the circumstance, that the doctor should be sent for." Very properly, without doubt; Mrs. Thackeray was the proper person to have delivered these orders; and as to the formality of sending to the husband, that the orders might be delivered through him, that was a formality that might certainly be very well dispensed with. " About nine o'clock in the same morning," Mrs. Thackeray says, " she made inquiry whether the doctor had been sent for? When she understood, to her surprise, he had not; on which she sent a message to Mr. Evans, desiring he would not delay a moment sending for the doctor, as he knew her to be in a very dangerous critical way." This is about nine o'clock; though Bobillier has sworn, that between nine and ten she found him shut up with her in the room, and that nothing had been done. Now, there is no proof in this case at all, that this message was delivered to Mr. Evans. However Mrs. Thackeray goes on to say, that, " understanding Mr. Evans had arose, she went into his room, and found Mrs. Evans in bed therein; that she was very feverish, greatly agitated, and in pain, and she thought her in labour; that, about eleven o'clock the same day, she, the deponent, was making tea for Mrs. Evans in her room, when Mr. Evans came to the door, and, putting his head into the room, told the deponent that she had got his tea-pot, but made no inquiry about Mrs. Evans; that shortly afterwards Dr. Denman came, and confirmed the certainty of her being in labour."

Why, then, all that I see proved in this case, by Mrs. Thackeray, is this; that she in the morning gave very proper orders, that the man-midwife should be sent for; that the man-midwife was not sent for, as he ought to have been, owing to the neglect of the person who received those orders, but not, as it appears, owing to the neglect of Mr. Evans; that between nine and ten, understanding he had not been sent for, she then sent a message, desiring that he might be sent for; and there is evidence over and over again in this case, to shew that Mr. Evans not only did send, in the manner which has been mentioned, but that he did, what most husbands, I presume, don't think themselves under any moral obligation to do; and that is, that he actually took his hat, and went out upon the business himself. But what weighs most with me in this case, and which is constantly uppermost in my mind, and repels every imputation

mation of this sort, is the consideration of what was the behaviour of the persons who must best have known, and most deeply have felt, the misconduct of Mr. Evans, if any such had existed.

Well, the delivery is effected, and is happily effected; the child is born.—Now is it possible, that, after a behaviour so atrocious as Mr. Evans's is represented; is it possible that no resentment should have been expressed on the part of Mrs. Webb, the mother and the other relations of the family? This is absolutely incredible. It is proved by Tilbury, that, “presently after, Mr. Evans hearing the door of Mrs. Evans's room open, he went to it, and Mrs. Webb came to the door, and plainly told him, in her hearing, *Thank God, it is all well over with Mrs. Evans, at last!*” on which Mr. Evans asked her what Mrs. Evans had got? To which she replied, A girl; and Mr. Evans, about an hour afterwards, went into the room.” I here ask, if it is conceivable, for one moment, that a business of this sort should have passed off just as smoothly as if nothing had happened to have discomposed the temper of any one person who was concerned in it? That is absolutely impossible. Taking then the whole of this business, without entering into the more minute circumstances, the principal conclusion which I arrive at is this, that there is no one fact in this case which I shall take upon the credit of that witness Bobillier. Of the other witnesses I go the length of saying, that they have deposed with passion; but of her I have no hesitation to say, that she has deposed absolutely without principle.

The next charge is that of making the noises, and which is deposed to singly by Bobillier: there is not another witness who has spoken to it. Tate, the nurse, who must have heard these noises (and who must be a nurse in the constitution of her mind very different from all other nurses that one has ever heard of, if she was willing to dissemble this ill behaviour of the noises) she is not examined at all by them. Tomlins, the waiting-maid, who must have been frequently in the room, is not examined upon the subject. Mayall, the wet-nurse is not examined upon the subject. On the contrary, here are a cloud of witnesses who depose the reverse. There would be no end of going through them all; there is Mayall; there is Frazer, Tate, Tilbury, who all depose, *una ore*, that they know nothing of these noises, excepting, that when there were noises, Mr. Evans interposed, and expressed a great deal of resentment; that he cautioned his servants against making these noises, in short, that

that he did as much as any master of a family can do to prevent the interruption of his wife's quiet.

As to his general attention to her during her illness—they have pleaded a total want of it; which, to be sure, would have been a very natural consequence of that which they have pleaded—his barbarous refusal to call assistance. But his attention to her is established beyond a doubt.—Tate speaks to it; Mayall speaks to it; Tilbury speaks to it; Dr. Denman speaks to it; Mr. Paumier speaks to it more fully. I do believe, that there is hardly a case, in which a husband could collect upon the subject so many favourable testimonies, as it has been the good fortune of this gentleman to bring together of that fact.

After this discussion, it would be idle for me not to say, that I do consider the whole imputation as an absurd calumny. I have no other way of accounting for the conduct of the relations. If the fact had been as is pleaded, it is impossible but that they must have known it; and if they had known it, they must have been destitute of all common sense, and of all common humanity, if they themselves had not been forward in loudly demanding a separation the very day after it had happened.

From that time there is a chasm in the history of actual cruelty till the 4th of October, 1788; of actual cruelty, I mean, so far as it is concerned in bodily acts. They travel, by the advice of Dr. Denman. Bobillier says, that “Mr. Evans made disagreeable difficulties.” What those difficulties were, I don't know; they might be real difficulties. Mr. Evans had not been able to settle his affairs in India, and it might have been very inconvenient to him to leave town; and the difficulties being real, might not be less disagreeable for being real. But however they do travel; and there is a space of nine months, I think, in which his cruelty appears to have been in a pretty deep sleep. However, it was only the sleep of the lion; for, upon the 4th of October, an act of barbarity was practised, which, to be sure, is equal to any of its predecessors.

It is stated in this way in the libel:—That, “after Mrs. Evans recovered from her lying-in, Mr. Evans would seldom let her lie at her ease in her bed, he frequently thrusting his elbows and knees into all parts of her back, sides, and loins, and thereby greatly hurting her; that in the night of the 4th day of October, 1788, Mr. Evans and Mrs. Evans being in bed together, in their house in Conduit-Street, he, without any cause or provocation whatever, began to quarrel with and abuse his said wife,

“and with great force and violence seized her, and dragged
 “her to every part of the bed; beat her head against each
 “of the bed-posts, and twisted, distorted, and forced her
 “limbs to so violent a degree, that he brought her feet close
 “up to her mouth; in which condition she swooned
 “away; and in that helpless state, after giving her several
 “dreadful blows and kicks, which caused the blood to issue
 “from her mouth and other parts of her body, he turned
 “her out of bed naked on the floor; in which condition,
 “helpless, and apparently lifeless, she lay a considerable
 “time, until her piercing cries brought three women from
 “different parts of the house to her assistance, who found
 “her naked on the floor, with her mouth full of blood,
 “to all appearance dead; her limbs quite cold and stiff, and
 “her legs crossed, and so twisted, that it was with great
 “difficulty they could extricate them, and which they could
 “not begin, until she shewed some appearance of return-
 “ing life, and could not effect until they had been with-
 “her upwards of an hour; and that, by the aforesaid cruel
 “treatment, Mrs. Evans was put to great pain and anguish,
 “and her life was in imminent danger; and on the next day
 “several marks and bruises were very plainly to be seen on
 “various parts of her body.”

There are three women, therefore, who are vouched in this case; that is, this Bobillier; there is likewise a person of the name of Glover; and there is Tomlins. And this is the only fact of barbarity to which Tomlins is called to depose: she speaks to all other circumstances of Mr Evans's behaviour towards his wife with the utmost partiality. As to Bobillier's testimony, I have already expressed myself in pretty strong terms of the opinion which I entertain of the truth of any assertion which comes from that witness; and therefore certainly, in weighing this business, I shall pretty much lay her out of the question. I will only just observe upon one circumstance, which shews pretty clearly the degree of alloy with which her evidence must be considered as debased. She describes herself as “coming into the room
 “at midnight, and finding Mrs. Evans in the situation
 “stated in the libel,” and to which she speaks very fully. She then says, that “after Mr. Evans had retired, and with
 “great unconcern,” [certainly a very odd appearance for a man to assume, taking the story to be real] “she staid with
 “Mrs. Evans till two o'clock in the morning, when Mrs.
 “Evans recovered from her state of insensibility.” (So that this poor lady, according to Bobillier, had been lying in this deplorable state from midnight till two in the morn-
 ing,

ing, and then awaked, to give an account of what had happened to her!)

Now it is positively sworn by Tomlins, that "the lady" was actually restored, and that she herself had taken Mr. Evans's night-clothes into another room; that she was afterwards called in by Mademoiselle Bobillier, and was ordered to deliver a letter, which was written to be sent to Mr. Thackeray, AT ONE IN THE MORNING! and it does so happen, that Mr. Thackeray himself deposes, "that this letter bore date at one." Yet this witness, in order to augment this transaction, pretends to state, that it was not till "after two" that Mrs. Evans awoke, and that consequently it must have been after two that that conversation took place between her and Mrs. Evans, which produced the writing and the sending of this letter. However the account given lies between Glover and Tomlins; and the account that they give, in substance amounts pretty nearly to this:—That Mrs. Evans was found certainly in a situation of apparent distress; what produced that distress *non constat*; for every thing had passed in the room between Mr. Evans and herself before any body was admitted. One witness says, that "her mouth was full of blood." The other witness says, that "she saw nothing of blood." The account given of what had passed *in recenti facto*, is given to me simply upon the credit of the French lady; and I am decidedly of opinion to take no fact upon the credit of that witness alone. I am then not ascertained, by that witness's singly telling me so, that Mrs. Evans did at this time give this account.—That there had been something of a struggle, in the course of which Mrs. Evans fell out of bed, or threw herself out of bed, or was thrown out of bed by Mr. Evans, these are the three possibilities which might have happened. But, supposing I got at it as a fact, that she was actually shoved out of bed by Mr. Evans, I must still go farther, in order to establish a case of cruelty; for I must go to the extent, that this was done intentionally, and not by accident. Both the fact and the intention must be proved, to make it a case of cruelty; I certainly shall not presume circumstances in order to make out such a case.

It has been asked, and very properly asked, Don't Courts of Justice admit presumptive proof? Do you expect ocular proof in all cases?—I take the rule to be this:—If you have a criminal fact ascertained, you may then take presumptive proof to shew who did it;—to fix the criminal, having then an actual *corpus delicti*. Shew me, then, in this case, that a crime has been committed, and I shall not be at a loss to fix the criminal: but to take presumptions in order to swell

an equivocal fact, a fact that is absolutely ambiguous in its own nature, into a criminal fact, is a mode of proceeding of a very different nature; and would, I take it, be an entire misapplication of the doctrine of presumptions. This fact, then, not being a criminal one upon the face of it; and being subject to three or four different interpretations, all of which are perfectly innocent, I think myself by no means at liberty to say, that I ought, by presumption merely, to make out this fact to be necessarily an act of delinquency.

However, what weighs more with me than all this, again, is, what I perpetually resort to in this case, *viz.* the *evidentia rei*; the conduct of the parties: that always arises in my mind. Upon any other supposition than Mr. Evans's innocence in this case, the conduct of every person who appears in the business; the conduct of the party; of the witness; of the agent; in short, the conduct of every body, is the most unnatural that can be devised; it is directly the contrary of what every rational person in that sort of situation would have pursued. Whoever reads the description in the libel, and then recollects the extreme bodily weakness of the person who was racked and tormented, and in this variety of almost inexplicable ways (as they have been well stated to be) must suppose, that she must have continued, for many days afterwards, in a very languishing state, and in a situation of great personal hazard; that her body must not only have been greatly bruised, but must wonder that it did not appear entirely dislocated the next day. Now, where are the medical persons in this case? Was no assistance of that kind invoked? Surely Mr. Evans could not have prevented the interposition of aid of that nature, because the matter was immediately communicated, and consequently assistance, if necessary, must have been called in. Mr. Thackeray, to whom a letter had been sent (Here again I see the finger of this busy incendiary, this *Mademoiselle Bobillier*) Mr. Thackeray, like an affectionate brother, comes at the first call.—There is some difference in the account of the witnesses as to the time when he came. Bobillier says, it "was between the hours of nine and ten." Mrs. Evans comes down to Mr. Thackeray—one would suppose that she came in a situation of great visible peril—there is nothing of that sort, as far as I see. He inquires what was the matter—She declines at first telling him—Then Mr. Evans takes up the matter, and begins to tell it—She stops him short, and gives the history of it herself; and the only particulars which stick upon the mind of this

man; a man of sense, and of strong attention to the
of his sister-in-law—the only particulars which stick
his recollection, and which he states to me, are, that
Evans had hurt her with his elbows, and violently
wed her out of bed.” Now, I ask, is this account con-
with the variety of tortures that were applied to this
lady, who was racked in the way that she is stated to
been in the libel? Is it possible that these two circum-
stances, and these two circumstances alone, should, in such
remain upon the mind of this gentleman?—It is most
y incredible.

the matter does not rest there. The consequences,
ever they may have been, were not in the slightest de-
rivable. Witnesses have been examined to them: there
ticularly Jessop, who swears, that “he saw her at din-
the next day, just as usual.” Frazer “saw her at
ner the next day, just as usual.” In short, she ap-
upon a reconciliation which then took place with her
nd, to have appeared just in her usual guise, without
teration of body or mind. And when I have the total
of all the persons who must have been able to speak
fact, if it had existed as a matter of any consequence
, I cannot help giving the whole business up, as a
r absolutely without weight or any significance what-

the conversation which then took place. Mr. Thacker-
as convinced that a separation was necessary; and then,
as I can conjecture, was convinced of it for the first
He accordingly proposed it. Mr. Evans was urgent

Mrs. Evans was violently averse to it.—Now from
I collect three things.

First of all, that Mr. Thackeray never could have heard
previous brutality which had been charged upon Mr.
; because if he had there could have been no question
that he would have had that conviction in his mind
before.

Second that I collect is, that if Mrs. Evans had suf-
these horrid outrages, it is most extremely unnatu-
ral she should herself have been averse to a separation;
ere love of life would have induced her to desire it.—
gentlemen say, and say very truly, that it is very
that this should be pressed to the disadvantage of Mrs.
s character, that she was willing to continue with her
nd; and so it would be: but it is not pressed to the
antage of her character; it is pressed only to the dis-
tance of the truth of her case. Yes; but it is next
said,

said, "It was the love of her children." Clear it is to me, from a fact which I shall afterwards mention, that it was not the desire of continuing with her children that operated in her mind, as a motive to make her feel a repugnance to the separation proposed.

Mrs. Evans's counsel have made very strong appeals to the humanity of the Court, and have said, what a prodigious cruelty I should commit, if I were to send this lady back again to this gentleman, after such cruel usage. There would be some colour for that, if I did not find that this lady herself, after almost every thing which they have stated to the disadvantage of this gentleman had passed, nevertheless remained firm in her attachment, and remained extremely desirous of continuing the cohabitation.

In the *third* place, it seems to me highly unnatural, that Mr. Evans, if I am to consider him as a person labouring under the conviction of this deep and detected guilt; it appears, I say, extremely unnatural that he should be the party to assume the tone of complaint, of disaffection and dissatisfaction; and should be the person to clamour for a separation.—As to his declining to state his grievances to Mr. Thackeray, I own I see many reasons why he might decline doing it, without any impeachment either of his own innocence, or of the honour of the gentleman whose jurisdiction upon that occasion he thought fit to decline. If a man has a dispute with his wife, which turns upon facts that are in controversy between the two, I do not think the relations of the wife are the proper tribunal before whom the husband is bound to answer.

This quarrel however was made up, yet it was but *gratia male facta*; for, after cohabiting together for some time longer, their harmony is again interrupted by an act, or an accident, which happened at the latter end of November. It is related by Mrs. Newland and by Mrs. Webber. For as to Bobillier, I say again that no credit is due to her.

It is, as pleaded in the libel, to this effect: "That at the latter end of November, or beginning of December, Mrs. Evans being in the drawing-room of their house in Conduit-Street, in company with two ladies and her eldest daughter, Mr. Evans came into the room and seated himself on a sofa, and asked her what book she was reading? That thereupon she immediately went to him with great good-humour, and, by way of answering his question, continued to read aloud a part of the book which she had before been reading; upon which he pulled her
"on

"on his knee, where she sat some short time, when he,
 "without any cause or provocation whatever, in great pas-
 "sion, suddenly and violently, and with his greatest force,
 "threw her from him on the hearth-stone, and thereby
 "greatly hurt and bruised her."

Now, the account given by the two witnesses whom I particularly point out in this case, Mrs. Newland, a sister of Mr. Evans, and Mrs. Webber who is a particular friend of Mrs. Evans, is this:—

Mrs. Newland does not depose at all as to the fact of throwing down, for she did not see it. All that she saw was, that Mrs. Evans came and sat upon his knee; that he complained of the interruption of something that he was reading; and the next thing she saw was, this lady rolling upon the hearth. So that her evidence, taking the whole of it, cannot affect Mr. Evans. Well, but it is said, from her account it nevertheless appears, that, immediately upon the occasion, Mrs. Evans brought home the charge to Mr. Evans; for, as Mr. Newland deposes on his offering to assist her up, she said, *You brute, let me alone*. Mrs. Webber says, that Mrs. Evans expostulated with him in a mild manner, when he offered to assist her; but the manner is this, *You brute let me alone*. And "she then rolled from him, "and got up without assistance."

Now, taking it that Mrs. Evans did suppose at this time, that it was the intentional act of Mr. Evans, still her supposition is not sufficient for the Court to raise an evidence of actual intention upon it. Mrs. Evans, prone to take offence, might perhaps ignorantly ascribe that to design which was the mere effect of accident. To take that, then, for the true representation of the fact, upon the single ground of her supposing it so, would, I think, be going a very dangerous and unreasonable length of admission indeed.

But, what is the account Mrs. Webber gives of this business? She speaks very imperfectly to a great deal of what passed. She admits her hearing not to be very good. She says, however, "she saw Mr. Evans lift up his knee, as she
 "could plainly discern, and Mrs. Evans then fell down
 "upon the hearth before the fire, near to which Mr.
 "Evans was sitting; on which the deponent, who was
 "very much frightened, screamed out, and said, Good
 "God, Sir, how could you do so? or, how could you be
 "so cruel?"

Now, in the first place, supposing the fact that this lady did actually see what she says she did see; is it at all a necessary

CONSISTORY COURT,

conclusion, or what have I to satisfy me, that this notion on the part of Mr. Evans, which possibly have been made with an intention to dislodge him from her seat, was yet done with the intention of producing the consequence which it produced, namely, that of lying her down upon the hearth, and hurting her considerably? She comes and seats herself upon his knee. She rises into a conversation with him. A husband is not always in a disposition to converse with his wife. She upon that occasion continues there. He makes a motion to dislodge her from her position, and this consequence happens, at she falls upon the hearth. He immediately, as it appears, attempts to give assistance, which she repulses in the way that Mrs. Newland says, *You brute, let me alone.* The other witness, Mrs. Webber, says, that she upon the occasion exclaimed, "Good God, Sir, how could you do so?" to which he answers, "He did not intend it;" which answer this lady chuses to call an *equivocal* answer, but which appears to me as *direct* an answer as could be given. Is there any thing like an equivocation, or ambiguity, in that answer?—Taking the utmost of the fact, then, upon the evidence of these two witnesses compounded together (for, as to weighing minute circumstances, there is no end of it) there might be perhaps a little want of caution, a want of some little attention at the time, just at the moment of removing this lady from his knee: but that there was an intention of cruelty; that there was an intention that this lady should be affected by the slight motion, to which perhaps he involuntarily had at that time recourse; I have nothing in the world that applies to my mind, with any degree of force whatever, to satisfy me that it was so.

But, what was the effect of this fall? And here again I report, as I must do from beginning to end, to the conduct of the parties—That is the key by which, I think, every thing here is to be unlocked. Why, Mrs. Evans had been it seems, reading a novel for the entertainment of the company—This accident, as tragical as almost any that happens in a novel, happens at this time; and what is the consequence of it? What is the impression it makes upon the mind of Mrs. Webber herself at that time? Why, I have given a detailed account of this cruel transaction, she goes on to say, that "she remembers she regretted much the entertainment that she had lost by the discontinuance of the reading of the novel." That is her impression. That is an act of horrid barbarity performed, and what is upon her mind is, the loss of the reading of this novel, w

been the entertainment of the evening. However, it did happen that she was not even deprived of this entertainment because she goes on to say, "that Mr. Evans staid in the " room, and he read the novel." Then I have this fact, that, after an act so brutal as this was, these ladies not only continued in the room with the monster, who had been guilty of it; but submitted to receive from him the entertainment, which they had been prevented, by his behaviour to Mrs. Evans, from receiving from her. I do think, then, that the coming afterwards and representing such a matter as this with any degree of gravity, is absurd and ridiculous in the highest degree.

It must also be observed, that Mrs. Evans herself came down that night after supper; and it has been made a proof of great barbarity on the part of Mr. Evans, that he observed to a gentleman who supped there that night, "that " the poor thing was not very well." Now, that depends entirely upon the manner of saying it, whether it is to be taken as an expression of insult or of condolence; of the condolence of a very affectionate husband, sorry perhaps that he had not practised all the care and attention, in that matter, which an affectionate husband might have wished to have done. He might then have very well said, "The " poor thing was not very well." But that it was done with any intention to insult her feelings—to be sure, the manner in which this Mrs. Webber has deposed to her own feelings on the occasion, abundantly satisfies me that it could not be done with any such intention.

Now, here concludes the history of personal cruelty, so far as it consists in personal and corporal acts. An history very heavy and formidable in its commencement, whilst it rests in mere *allegation*; but which grows weaker and more insignificant every step as it advances towards *proof*. Comparing the charge and the proof, I think it, then, my duty to discharge that debt which the justice of this Court owes to the character of Mr. Evans, by declaring, that, upon the most careful and the most conscientious investigation of it, this prosecution, so far as it respects these facts, is unadvisedly and unwarrantably brought. I therefore fully exculpate him from the charge of unmanly cruelty, which is founded upon these facts; and I do very sincerely regret, that, under any advice, this poor lady should have preferred so black an accusation against her husband, and one so totally destitute of all reasonable colour.

On the 23d of December, Mr. Evans took the resolution of finally separating from his wife. It is pleaded in the
four-

fourteenth article of the libel, that "he did arbitrarily, "and without any cause or provocation whatever, deprive "his wife of all government in his family, and authority "over his servants; and that he did, on or about the 23d "of December, 1788, finally withdraw from her, and "without cause."

Now, from stating the deprivation of authority first, and the separation afterwards, one would suppose that he had deprived this lady of authority in his house, before he quitted it himself; and to that effect, Tomlins positively swears, viz. that "some time about the 4th of October, he "gave her orders not to obey Mrs. Evans, but to obey other "persons," who are there mentioned. This, however, is erroneously and carelessly stated; because it is most positively contradicted by all the other servants who are examined—Odell, Frazer, Glover, Jessop; all of whom are examined upon the thirteenth article, and who say, that this deprivation of authority did not take place while Mr. Evans continued in a state of cohabitation with her. However, there is a fact which comes out upon the evidence of Odell, and it is this; that Mr. Evans had taken into his own hands something of the department of the house economy: I don't think it very clearly appears what—it is upon the third interrogatory; to which she answers, that "Mrs. "Evans declined giving orders, when the respondent applied to her, soon after her first going to live in her service (which was, I think, upon the first day of November), "and told her to go to her master; that she would not take "the management of the house; that, as Mr. Evans did "part, he might do the whole: and she could not then "settle her bills; in consequence of which, he took the management of all his household concerns; and, on a new "servant coming, the respondent told Mrs. Evans of the "servant's coming to be hired; but she would have nothing "to do with it, on which Mr. Evans hired her; and he "did not, to her knowledge, refuse to permit her to hire a "maid-servant, or to do any other domestic office of that or "the like nature."

The counsel have taken up this quarrel pretty strongly in behalf of Mrs. Evans, and have inveighed very loudly against the barbarity of a husband, for taking into his own hands any part of the family economy; but, in my apprehension, a good deal without reason. I cannot call it cruelty, if a gentleman chuses to settle his weekly bills himself; because, I take it, that a wife acts in this respect not by any original right, but as the steward and as the representative

sentative of her husband. And if a man has but a moderate opinion of his wife's management, and is vain enough to have a better of his own, why, if he does chuse to take into his own hands the payment of the weekly bills, I protest it does appear to me to be that kind of conduct with which no magistrate, ecclesiastical or civil, has any right to interfere. I say, I see nothing in that; but I do see, here again, on the other side, a proneness to take offence; a disposition to revolt; a disposition to return a supposed insult by something very like disobedience.

On the 23d of December, Mr. Evans took the resolution of finally separating from his wife. There had been for a time growing dissensions, which had frequently ripened into proposals for a separation; and these proposals, which had always come from Mr. Evans, had been withdrawn upon the interference of friends, and the parties had become half reconciled.

In September, 1788, he had very abruptly quitted Mr. Thackeray's, where he had been upon a visit with his wife; and he proposed a separation in a letter, the contents of which are stated, in a great measure, by Mr. Thackeray. Now, there could have been no fact of cruelty at that particular time, which gave occasion to the desire of a separation; because Mr. Thackeray swears that "he does not know the occasion of this quarrel," though it clearly happened at his own house. It could, then, have been no more than mere private disagreement. In the separation proposed was this circumstance, that "he had acceded to her having the charge of the children." After this, I can never, surely, admit it to be said, that the reason why this lady chose to remain with her husband was, "an apprehension that she might be debarred of the comfort of her children;" because the terms of the separation then proposed were, "that she should have the charge of the children." Mr. Thackeray, very prudently anxious for a reconciliation, as I think he was (supposing him ignorant of all these atrocious facts of cruelty) he, after all this, wrote a letter to Mr. Evans—stating what? Why, stating "Mrs. Evans's uneasiness, and her anxiety for a reconciliation;" though she was then either in possession of the children, or at least had the possession of them absolutely secured to her. It is impossible, then, for me to suppose one moment, after this, that her anxiety for a reconciliation proceeded from any thing else than an attachment to her husband.

Mr.

Mr. Thackeray says, he requested a meeting; Mr. Evans declined it, but desired the means of meeting a third person, after Mrs. Evans had agreed upon a separation. I see nothing that is at all particular in that. It seems to me a proper caution on his part, that he should have desired to have his family controversy submitted rather to the judgement of a third person, than to the judgement of a person, who, though a very honourable man, was yet, it is to be remembered, the brother-in-law of Mrs. Evans. However, a reconciliation was effected at this time, and the parties lived together again until October the 4th, when the accident happened which I have before described.

Then again Mr. Evans insists, as he always does, upon a separation. He is the party always insisting upon that. Mr. Thackeray, for the first time, then yields to the necessity of the case; though he clearly yields with a good deal of reluctance. However, by the good offices of Mr. Henniker, they are again half reconciled.

On the 23d of December, Mr. Evans withdraws himself totally, taking with him the person of his eldest daughter; and offers to Mrs. Evans, in a letter, which has my notice because it has been noticed by the Council on both sides, a settlement of £. 500 a year. The letter, though written in the height of irritation, does not insinuate that species of misconduct with which she has been improperly charged in his allegation: it only charges her with intolerable manners.

Now, here, I think, that an impropriety, for the first time, attaches on the conduct of Mr. Evans; for Mr. Evans must be informed, that the law of this country, and of every Christian country, does not allow a man to use the language, *I will be separated from my wife*.—If Mrs. Evans had been guilty of any misconduct for which the law would decree a separation, he would be perfectly right in withdrawing himself; but in all cases where the law does not pretty positively allow, it pretty positively, I believe, condemns.

Marriage is the most solemn engagement which one human being can contract with another. It is a contract formed with a view, not only to the benefit of the parties themselves, but to the benefit of third parties; to the benefit of their common offspring, and to the moral order of civil society. To this contract is superadded the sanctity of a religious vow, to which Heaven itself is made a party. Mr. Evans must be told, that the obligations of this contract are

not to be relaxed at the pleasure of one party. I may go farther; they are not to be lightly relaxed even at the pleasure of both. For, if two persons have pledged themselves, at the altar of God, to spend their lives together, for purposes that reach much beyond themselves; it is a doctrine to which the morality of the law gives no countenance, that they may, by private contract, dissolve the bands of this solemn tie, and throw themselves upon society, in the undefined and dangerous characters of a wife without a husband, and a husband without a wife.

There are, undoubtedly, cases for which a separation is provided; but it must be lawfully decreed by public authority, and for reasons which the public wisdom approves. Mere turbulence of temper; petulance of manners; infirmity of body or mind, are not numbered amongst those causes. When they occur, their effects are to be subdued by management, if possible, or submitted to with patience; for the engagement was "to take for better, for worse;" and, painful as the performance of this duty may be; painful as it certainly is in many instances, which exhibit a great deal of the misery that clouds human life, it must be attempted to be sweetened by the consciousness of its being a duty, and a duty of the very first class and importance.

Mr. Evans, in determining to quit his wife, does that which the law does not approve, and for which it provides a remedy. But the remedy is certainly not that which is sought for in the present suit; the remedy is the "remedy of restitution." It would be absurd to suppose that the law which furnishes that remedy, furnished at the same time another remedy which is totally the reverse of it, and totally inconsistent with it. To say that the Court is to grant a separation, because the husband has thought fit to separate himself, would be to confirm the desertion, and to gratify the deserter; and the Court would then become the perpetual instrument of these voluntary and illegal separations.

I can never, therefore, make desertion a ground of separation, though, in conjunction with acts of cruelty, it frequently is; and, though it may be thought hard to send a wife back to a husband who has given her such a proof of alienated affections; yet the Court does not send her back without due care for her reception: for the monition is, not only, "that he shall take her back," but "that he shall treat her with conjugal kindness;" and, though the Court cannot interfere in the minute detail of family life (for much must ever be left to the conscience of individuals),

viduals), yet the Court will see its monitions so far obeyed, that the great obligations of conjugal duty shall be complied with.

What I have to say upon the remaining part of this case will be comparatively short, because every thing that follows in this history, arises out of this act of separation; and I have already said, that this suit is not the proper remedy for a complaint for separation. The true remedy cannot be obtained by this suit; for, it is a mistake to say, as it has been said on this occasion, that, in the present suit, I can issue a monition to either party to return. This suit can lead to no such sentence.

Mr. Evans quits his wife, and, in that respect, does an improper thing; that improper step is followed by others of the same nature; for there is no such thing (one has often occasion to observe it) as doing an improper thing with strict propriety. He is charged with having denied to his wife access to her child. If the fact were true, though he certainly might do it, yet I should deem it a most improper exercise of the marital power, very disgraceful to the person who practised it, and a most wanton and unnecessary outrage upon the feelings of a mother. But the evidence, as far as it goes, does not, in my apprehension, support the imputation. In his letter he expressly engages that access shall not be denied. Mr. Henniker, who carried that letter, knowing its contents, is to be considered as guarantee of that engagement. As to the letter mentioned by Bobillier, of a contrary effect, I take that to be one of the many fictions with which that lady has thought fit to adorn her evidence. And as to the taking her away to a boarding-school, though I do wish it had been done with less privacy, and less precipitation, as that would certainly have been more prudent; yet the placing of the child in a place of education, does by no means prove that he meant to debar her the sight and access of her mother; and therefore I do not hold that fact to be proved in this case.

When Mr. Evans quits his wife, he withdraws not, as is insinuated in the libel, a proper contribution to the support of his wife; but he does withdraw, I think, a proper mode of making that contribution. He commissions his agent, Mr. Jackson, in conjunction with Mr. Evans senior, to furnish all necessaries for Mrs. Evans and the family; he offers £. 500 a year separate maintenance; and this furnishing of necessaries was, as I understand Mr. Jackson, merely provisional till some settlement was actually made. He leaves directions with the servants, of which a

copy is exhibited, certainly drawn in terms sufficiently peremptory, in which he refers those servants, for all orders, to Miss Evans. Now this is, certainly, a situation of dependence and indignity in which Mrs. Evans is placed. It is putting her, for the supply of her necessities, into the hands of his sister and his solicitor. But then, I must remember the fact, that Odell says, that at this time Mrs. Evans had abdicated the government of the family, in consequence of the offence which she had taken at some conduct of Mr. Evans. She had refused to carry on the family business. Somebody must take care of the house. If Mrs. Evans would not undertake it, perhaps Miss Evans was as proper as any body else. To be sure, if Mrs. Evans had at this time signified her desire to act as mistress of the house; if he had remonstrated at this moment against this entire transfer of domestic authority, there would have been ground of complaint; but I think Mr. Evans, under the circumstances, had no reason to presume, that she would have done that under a state of separation, which she had refused to do, living in conjunction with him. Though I think it is a degradation under which she ought not to remain: yet I cannot help thinking that she has herself very largely contributed to place herself upon that footing.

It is charged, in the next place, that he deprived her of all pecuniary credit. I should be unwilling to remark, that, if proper supplies were furnished by the attention of Mr. Evans senior, and Mr. Jackson, credit was not absolutely necessary. However, the proof of the fact is this; that Sir Herbert Mackworth, his banker, and Mr. Boehm, were forbid to furnish her with money (as proved by Mr. Moore) without his written order. Now, I protest that I have never understood it to be a part of the prerogative of a wife, that she shall have a right to draw for what she likes upon the banker of her husband. The purse is her husband's; and it seems to me a matter of indifference, in its own nature, whether the supplies pass through the hands of Sir Herbert Mackworth, or Mr. Jackson and Mr. Evans. It is necessary, undoubtedly, to supply her with money; but the mode of doing it by a banker, I suppose, is not absolutely necessary: I do not take it to be perfectly usual. He had indulged her before with an unlimited liberty of this kind, which, upon the separation, it is proved he withdrew. That, under the present circumstances, he should not leave her an unlimited power of drawing upon his banker, nobody could wonder. And as far as £.500 a year went, he professed (and gave every evidence of sincerity in those professions)

fessions) that he was ready to leave her that power. No proof, here again, is offered that Mrs. Evans ever requested any money of him. If a husband, upon request, refuses to furnish necessaries, either by himself, or his agent, undoubtedly he is culpable; but, if a wife does not think fit to make any request or demand, it is going too far to fix upon a husband cruelty, merely because he refuses one particular mode of supplying her with money, and which mode he was never bound, under any circumstances, to practise; but which in the present case, as far as it appears, he has never even been requested to conform to. The fact is, that, finding her credit stopped at the banker's, she trusted (as well she might) to the kindness and liberality of her relations; and, without making any application to her husband, as I see, avails herself, not very advisedly, of this as a circumstance on which to found a charge of cruelty.

He is charged, in the next place, with refusing her the aid of medicine, and that, with that view, he sent Mr. Jackson, his attorney, to Mr. Paumier, to forbid him supplying her with medicines. They have both been examined, and they differ in their evidence. Mr. Paumier says, "he received orders from Mr. Jackson." Mr. Jackson swears, "he accidentally met Mr. Paumier, who asked if he was to attend her on Mr. Evans's account; that he declined giving any directions, as she had left the house; that he never forbid any person from giving her credit, nor was ever sent for that purpose by Mr. Evans; nor did he, nor did Mr. Evans ever, to his knowledge, forbid any person from giving her credit." Then, I am either to suppose that Mr. Paumier misunderstood Mr. Jackson, which might easily be, or, that Mr. Jackson delivered those orders of his own head, for, he does positively swear that he was never sent with any such orders from Mr. Evans; and, in order to affect Mr. Evans with this fact, he must be the orderer. Supposing it to be fixed upon Mr. Evans, it might still remain, I think, for consideration, how far the discharging of Mr. Paumier, who, for any thing that appears, was not particularly desired by this lady to attend her; how far the discharging him merely from the obligation of attending on Mr. Evans's account, is to be deemed an act of cruelty; more particularly where the husband knew (as he could not but know) that she was under circumstances, where she was sure to receive every assistance of that kind from her relations. I do think, to call this a refusal of all necessary medical aid to a person who was ill, does seem to me to be putting upon such a business no very fair colour.

That

That a woman, under such circumstances as she now was placed, should not chuse to continue any longer in the house, is not to be wondered-at. It was certainly a state of indignity. But Mr. Jackson positively swears, that "he offered no violence; that he threatened none; that he was not authorised to do either the one or the other; and that it was a matter of considerable surprise to him when she quitted the house." To me however, I own, it would have been a matter of surprise, if she had continued there, considering the footing upon which she then was. Mrs. Thackeray swears, that "she saw two or three letters from Mr. Jackson, intimating that Mrs. Evans must quit the house, or he would take steps that would be disagreeable." Now, taking it that Mr. Evans meant to have two houses, two separate establishments; to have an establishment necessary for the wife; to be sure a less house would be sufficient for her in consequence of this separation; and no just cause of complaint could arise, unless the house to which she was desired to withdraw was such a one as it was improper for the wife of Mr. Evans to inhabit; for, I cannot but say, that a husband has a right to direct the removal of his own family.

There is another matter, which has been made a pretty long subject of discussion in this case; a matter of trunks and boxes, which has been introduced into the allegation, but not into the libel. One representation is given of it by Mr. Jackson; another by Mademoiselle Bobillier: and I think I do not pay any one individual any sort of compliment, when I say, that I shall take his deposition in preference to her's.

After all, there are, certainly, circumstances sufficiently hostile attending this separation. I wish it had been conducted with more care; with more caution; with more tenderness, on the part of Mr. Evans; for care, caution, and tenderness, would have been prudence. I must however remember, that there were at this time declared hostilities subsisting; great mutual exasperation. It was now become a contest of etiquette, of honour and spirit, on both sides. Nothing can be more clear to me, than that the husband meant to support his wife with sufficient liberality; he had always done it; for want of liberality is no where in the cause to be found imputable to him. However, the parties agreeing in substance, they disagree in terms; they disagree only in the nature of the security that was to be given for the allowance proposed. It is not my business to drop an opinion upon that subject; for, after what I have said, it

will be sufficiently clear that it is not the business of this Court to approve at all of such separations. But, if I could with propriety for one moment abstract myself from the public situation which I am now in, and could stand in the situation of a private individual, and as the adviser of Mr. Evans, I should say, that the generous part would be the prudent part in such a business; and that a conduct of that nature would be that conduct, under all the circumstances, which it was most advisable to adopt:—however, with that I have nothing to do. The spirits of the parties are mutually irritated against each other; the treaty goes off upon that ground; and the refusal to adopt a particular mode of securing the allowance, is to be construed a denial of all necessary support, and to be made the foundation of an accusation of cruelty.

The truth of the case, according to the impression which the whole of it makes upon my mind, is this:—Two persons marry together; both of good moral characters, but with something of warmth, and sensibility, in each of their tempers; the husband is occasionally inattentive; the wife has a vivacity that sometimes displeases, that sometimes offends and sometimes is offended; something like unkindness is produced, and is then easily inflamed; the lady broods over petty resentments; which are anxiously fed by the busy whispers of humble confidants; her complaints, aggravated by their reports, are carried to her relations, and meet with something like a facility of reception from their honest, but well-intentioned, minds. A state of mutual irritation increases; something like incivility is continually practising; and, where it is not practised, it is continually suspected; every word, every act, every look, has a meaning attached to it, it becomes a contest of spirit, in form, between two persons eager to take, and not absolutely backward to give, mutual offence; at last the husband breaks up the family connection, and breaks it up with circumstances sufficiently expressive of disgust: treaties are attempted, and they miscarry, as they might be expected to do, in the hands of persons strongly disaffected towards each other; and then, for the very first time, as Dr. Arnold has observed, a suit of cruelty is thought of; a libel is given in, black with criminating matter; recrimination comes from the other side; accusations rain heavy and thick on all sides, till all is involved in gloom, and the parties lose total sight of each others real character, and of the truth of every one fact which is involved in the cause.

Out of this state of darkness and error it will not be easy for them to find their way. It were much to be wished that they could find it back again to domestic peace and happiness. Mr. Evans has received a complete vindication of his character. Standing upon that ground, I trust he will act prudently and generously; for generosity is prudence in such circumstances. He will do well to remember, that the person he contends with is one over whom victory is painful; that she is one to whom he is bound by every tie that can fasten the heart of one human being to another; she is the partner of his bed!—the mother of his offspring! And, if mistakes have been committed (and grievous mistakes have been committed, most certainly, in this suit) she is still that person whose mistakes he is bound to cover, not only from his own notice, but, as far as he can, from that of every other person in the world.

Mrs. Evans has likewise something to forget; mistakes have been made to her disadvantage too in this business: she, I say, has something to forget. And I hope she has not to learn, that the dignity of a wife cannot be violated by submission to a husband.

It would be happy indeed, if, by a mutual sacrifice of resentments, peace could possibly be re-established. It requires, indeed, great efforts of generosity, great exertions of prudence, on their own part, and on the part of those who are connected with them. If this cannot be done; if the breach is too far widened ever to be closed, Mrs. Evans must find her way to relief; for, she must not continue upon her present footing, no not for a moment: she must call in the intervention of prudent and respectable friends; and, if that is ineffectual, she must apply to the Court, under the guidance of her counsel, or other persons by whom the matrimonial law of this kingdom is understood.

But, in taking this review, I rather digress from my province in giving advice: my province is merely to give judgment; to pronounce upon what I take to be the result of the facts laid before me. Considering, then, all those facts, with the most conscientious care, and with the most conscientious application of my understanding to their result, I am of opinion, that Mr. Evans is exculpated from the charge of unmanly and unlawful cruelty. I therefore pronounce, "that Mrs. Evans has failed in the proof of her libel, and
"dismiss Mr. Evans from all further observance of justice
"in this behalf."

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C A S E S

In the COURT OF KING'S BENCH in TRINITY
TERM, 30 GEO. III.

The following General Rule was made by the Court
in this Term.

It is ordered, That from and after the last Day of
this Term, (Trinity 30 Geo. III.) the *Custos Bre-*
vium of this Court shall indorse upon every Writ
on what Day and at what Hour the same was filed.

By the Court.

REX v. STOBBS.

The defendant, being one of the Officers of the Palace
Court at Westminster, arrested E. Pyott, Esq. by virtue of
a Writ out of the said Court, and within the limits of the
same, and without leave for making the arrest being first
obtained from the Board of Green Cloth. In consequence
of which he was indicted for the assault and false impris-
onment, and a special verdict was found on the trial.
The question now before the Court was, whether an in-
dictment, under the circumstances abovementioned, would
lie against this Officer for arresting a person not of the King's
Household, within the jurisdiction of the Palace?

LORD KENYON, Ch. J.—If the decision of this question
were to interfere with any of the privileges, annexed by the
common law to the king's palaces, or if the opinion which

I am prepared to give on this record were to militate against any of the authorities which have been cited, and particularly that before Lord *Holt*, Mr. J. *Powell*, and Mr. J. *Gould* (6 *Mod.* 73, 2 *Raym.* 978), I should have wished to consider the point more fully before I pronounced judgment. But the determination of this case will not interfere with either. There is a great deal of good sense in guarding the king's palaces in an extraordinary manner against any thing which may lead to a riotous assembly of persons there. And therefore the common law has, in my opinion, wisely ordained (if it has provided), that persons not immediately connected with the household should not come within the palaces, though professing to execute the process of the law. Upon this principle stands the authority in the 3d *Inst.* But no one case has been cited to shew that the process issuing out of the *palace court* cannot be executed within the jurisdiction of that Court. Then supposing that there were certain privileges annexed by the common law to the king's palaces prior to the reign of Charles the Second, yet undoubtedly the king had a right to dispense with any of those privileges, and he did by charter dispense with some of them, as far as respects the palace at Westminster; for by that he erected a jurisdiction *within* the palace of Westminster and extending 12 miles round it, and directed that one of the processes of that Court should be a *capias*. And this charter gave a general power to execute the process of that Court within the jurisdiction. It is true indeed that the officers of the household are exempted out of this charter; and that accounts for the several applications that have been made to the Board of Green Cloth, in order to discriminate between those persons who were exempted in the charter, and those who were liable to the process of the Court. These applications probably were made to the Board of Green Cloth, who have the superintendence of the household, to know whether the person, against whom process had issued, did or did not belong to the household, upon which depended the privilege of being exempt from arrest there. I avoid giving any opinion as to the powers which other courts may have at common law within the palace; my judgment proceeds entirely on the charter of Charles the Second, by which this Court was created, and which gives express jurisdiction and power to execute the process of the *palace court* within the palace. This determination, therefore, will leave untouched every common law privilege, and every authority which has been cited.

ASHMURST,

ASHHURST, J.—If this had been an infringement of any of the king's privileges, I should have wished to have taken time to consider whether an indictment would not have lain for it: but we are relieved from the consideration of that question, because it appears from the facts stated in the special verdict, that the defendant has not been guilty of a contempt or infringement of any of the king's prerogatives. It would be very extraordinary if, when the charter of Charles the Second had erected a Court with jurisdiction within the Palace, the process of that Court could not be executed without the leave of the Crown. The exception in the charter explains the practice of applying for leave to arrest within the Palace, which was for the purpose of inquiring whether the party against whom the writ was sued out, was or was not of the household. Such was probably the origin of that practice, which at last became almost general without adverting to the reason on which it was founded.

BULLER, J.—It is expressly provided by the charter, by which this Court was erected, that all process issuing out of it shall be executed by the bearers of the rod of the household; and it is stated in this verdict that the writ in question was directed to the bearers of the virge of the household, and that the defendant is one of them.

GROSE, J. of the same opinion.

Judgment for the defendant.

JONES v. CONCANNON.

This was a Motion for Judgment as in Case of a Non-suit for not going to Trial in an Action of Replevin; but the Court refused a Rule, on the ground that in Replevin both parties are actors, and the defendant might have carried down the record by proviso.

SHIRLEY

SMITH v. BOWER.

This was a Case upon Promises. Plea, the Statute of Limitations. Replication, that within six years after the cause accrued, namely, November 1785, the plaintiff sued out a bill of Middlesex against the defendant and J. Astle, for the same cause of action, returnable Monday next after eight days of St. Hilary; that, on a return that those defendants were not found, another writ was issued, returnable Wednesday next after fifteen days from the day of Easter; that regular continuances were entered till Friday next after the Morrow of All Souls, at which day the plaintiff appeared and offered himself against the defendants in that plea, but the Sheriff did not return the precept, nor did any thing therein; therefore the plaintiff, afterwards on the 6th of November 1789, prosecuted out of this Court against this defendant an attachment of privilege for the same cause of action; to which the defendant appeared. The question was, Whether an attachment of privilege is a continuance of a bill of Middlesex, so as to avoid the Statute of Limitations?

LORD KENYON, Ch. J.—It is true that if an action be commenced, though informally to prevent the operation of the Statute of Limitations, it will have that effect *if it be duly continued*: but the question here is, whether the action were duly continued or not? The mode of continuing a bill of Middlesex, or a *latitat*, is very familiar; it is in every day's practice. But here the plaintiff abandoned the proceedings on the bill of Middlesex, and sued out an attachment of privilege, which bears no analogy to the former proceeding. I am therefore clearly of opinion that this was not a continuance of the former suit, and that the replication cannot be supported.

ASHHURST, J.—In order to prevent the Statute of Limitations from running, it is absolutely necessary, not only that a writ should be sued out, but that it should be regularly continued. Where indeed the plaintiff has been guilty of an omission, or mere irregularity, the Court will interpose, and grant him an indulgence for the sake of preserving the right of action; and it is on that ground that we permit continuances to be added afterwards. But where it is admitted that the party has discontinued, he cannot sue out a writ of a different nature, and consider it as a continuation
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of the former action: he must pursue his action in the mode allowed by the Courts.

BULLER, J.—The word “continuance” is so plain and simple in itself that it is not capable of two interpretations. When we speak of writs being continued, we mean that it must appear on the record that the Court has, from time to time, kept the original suit alive; and that the plaintiff is *proceeding to bring the defendant into Court, on the suit originally commenced*. But it must appear on the record that it was a continuance of the original writ. Now here a bill of Middlesex was sued out, which was continued down to a certain time, when that proceeding stopped, and then the plaintiff sued out an attachment of privilege, which was not a continuance of the former writ; for it has no connection with it. The cases from *Shower*, 367, and *Barnes*, 343, were cited to shew that an attachment of privilege was only as a *latitat*, and not as an original writ: but that proves that it is not a *latitat*; for *nullum simile est idem*. With respect to the instances put at the Bar, of a person becoming a Member of Parliament, or an Attorney, after he is sued; it will be time enough to decide the former when it occurs: but the latter is too clear to admit of a doubt, for he cannot avail himself of the privilege which is conferred on him after the action is brought: and, if in such a case he were to plead his privilege, the plaintiff might reply that the writ was sued out against him before he became an Attorney.

GROSE, J.—The Statute of Limitations enacts that all actions upon the case shall be commenced and sued within six years next after the cause of action; but this suit was not commenced within that time; for a bill of Middlesex and an attachment of privilege cannot be said to be one and the same suit.

Judgment for the defendant.

DOE on the Demise of CHURCH and PHILLIPS, vs.
PERKINS and Others.

Upon the trial of this ejectment, before Lord Loughborough at the Assizes for Bucks, a verdict was given for the plaintiff. Now, upon a motion for a new trial, the chief question was, Whether the evidence of one Aldridge ought to have been admitted? it being stated upon the Judge

report, that the title of the plaintiff to the several premises was not in dispute; but that the only question was at what time of the year the annual holdings of the several tenants expired. That Aldridge, the witness, whose testimony was objected to, went round with the receiver of the rents to the different tenants, whose declarations respecting the times when they severally became tenants, were minuted down in a book at the time; some of the entries therein being made by Aldridge, and some by the receiver. When Aldridge was examined, the original book was not in Court; but he spoke concerning the dates of the several tenancies from *extracts* made by himself out of that book, confessing, upon cross-examination, that he had no memory of his own of those specific facts; but that the evidence he was giving as to those facts, was founded altogether upon the extracts which he had made from the above-mentioned book. This evidence was objected to at the time, on the part of the defendants, upon the ground that, as the witness did not pretend to speak to those facts from his own recollection, he ought not to be permitted to give evidence from any extracts, but that the original book from whence they were taken, ought to be produced. The learned judge, however, being of a different opinion, the evidence was admitted, and the plaintiff had a verdict.

LORD KENYON, Ch. J. said, this was a matter of such general practice, the rule ought to be finally settled for the future; and read the following note from the MS. of the late Lord Ashburton.

“ Michaelmas Vacation, 1753, at Lincolns-Inn-Hall, before the Lord Chancellor—3d December. Mr. Noel moved to suppress depositions on a certificate from the Commissioners, before whom they had been taken, that the witness, whose depositions they were, refreshed her memory, during her examination, by minutes, consisting of six sheets of paper of her own hand-writing, the substance of which she declared to them she had set down, from time to time, as the facts occurred to her memory; that five of the six sheets were drawn up in the form of a deposition, which she told them was done by the plaintiff's Solicitor, whom she had requested to digest her notes, and reduce them to some order; and that after he had done so, she transcribed and altered them wherever it was necessary to make them consistent with her meaning. The certificate added further, that she declared the six sheets to have been entirely drawn up by herself, unassisted by any person whomsoever: that as they apprehended they had no right to take the minutes from
her.

her, she had frequent recourse to them during her examination: and this certificate was signed by all the Commissioners. Mr. Noel insisted that this practice was too dangerous to have the countenance of the Court; and that there was a sufficient foundation for this application to suppress the depositions. The motion was opposed by the Attorney and Solicitor-General, who insisted that nothing was more frequent than to allow witnesses in a Court of Law, the use of minutes to refresh their memory. That the only circumstance which seemed to distinguish this case from that, and to give a colour to the present application, was the witness's employing the plaintiff's attorney to digest her memoranda; but there could not be much weight in that circumstance, when it was considered that it was not pretended that there had been any tampering with the witness, and that she had carefully altered these papers wherever the Attorney had mistaken her meaning; that she swore positively to the truth of every part of them: and though it might be improper to write the whole of a deposition before examination, yet where a person was to be examined to a great number of dates, &c. it was very necessary to have some helps of this kind.—Lord Chancellor. Whether there has been any tampering or no; I know not; but I know there has been a great mistake both by the parties and the Commissioners, who however did right, after their mistake, to lay it before the Court. Should the Court connive at such proceedings as these, depositions would really be no better than affidavits; for should a witness be permitted to use a paper, especially one drawn up by the attorney of one of the parties, though from memoranda furnished by the witness, I might as well let the Attorney draw an affidavit for her, and use that instead of a deposition. She insists indeed that she altered and amended it; but every body knows that slight alterations in a phrase, make it convey very different ideas. To be sure, in some cases, a man may use papers at law; but I have known some Judges [and I think I adhered chiefly to that rule myself] let them use only papers drawn up as the facts happened, and all other papers I have bid them put in their pockets; and if any had been offered which were drawn by the Attorney, I should have reprimanded him severely. As to the dates and names, which are merely technical, it is quite another thing. The Commissioners should have rejected these depositions: but as they have fairly represented the fact, and the whole of the motion is to suppress the depositions, for the precedent's sake they shall be suppressed. And as publication is not passed, you may

may examine the witnesses. The Chancellor seemed to intimate that he would have animadverted on the Attorney, had it been made part of the motion."

On the following day Mr. Justice Buller read another MS. note of *Tanner v. Taylor, Hereford Spring Assizes, 1756*. "In an action for goods sold, the witness who proved the delivery, took it from an account which he had in his hand, being a copy, as he said, of the day-book, which he had left at home: and it being objected that the original ought to have been produced, Mr. Baron Legge said, that if he would swear positively to the delivery from recollection, and the paper was only to refresh his memory, he might make use of it. But if he could not from recollection swear to the delivery any further than as finding them entered in his book, then the original should have been produced: and the witness saying he could not swear from recollection, the plaintiff was non-suited."

LORD KENYON, Ch. J.—The rule appears to have been clearly settled, and every day's practice agrees with it. And comparing this case with the general rule, we are clearly of opinion that Aldridge, the witness, ought not to have been permitted to speak to facts from the extracts which he made use of at the trial.

Rule absolute for a new trial.

FENN and Another, v. HARRISON and Others.

C A S E.

A Bill of Exchange was drawn by Livesay and Co. on Gibson and Johnson, in favour of one Norman, which came by indorsement to the defendants, who wanting it discounted, gave it to Francis Huet for that purpose; telling him to get cash for it, but that they would not indorse it. Huet applied to his brother James Huet to get it discounted, informing him that it was the defendant's bill; and that though they did not choose to indorse it, yet he added (as a reason of his own) that as their number was on the bill, it was equivalent to an indorsement; and that he would indemnify him if he indorsed the bill. On James Huet's application to the plaintiff's, they discounted the bill, in James Huet indorsing it, without which it would not have

have been done: but they chiefly relied on the credit of Gibbon and Johnson, for at that time they did not know that the defendants were concerned in the bill. But after the failure of Gibbon and Co, the plaintiffs hearing that the bill had passed through the defendant's hands in the manner abovementioned, they applied to them for payment, who at first refused, but afterward promised to take it up; but on their not doing so, this action was brought. The action was tried before Lord Kenyon, who directed the Jury, if they were of opinion that James Huet had made himself answerable to the plaintiffs as agent for the defendants, that was a sufficient consideration for the defendant's promise: and the Jury being of that opinion, found a verdict for the plaintiffs.

The present application to the Court was for a new trial, on the ground that this was *nudum pactum*.

LORD KENYON, Ch. J.—This is a question of great nicety: and during the trial of the cause I entertained considerable doubts upon the subject, and even at this moment the utmost that I can say is that the leaning of my mind is in favour of the verdict. It is extremely clear that, if the holder of a Bill of Exchange send it to market without indorsing his name upon it, neither morality nor the laws of this country will compel him to refund the money, for which he has sold it, if he did not know at the time that it was not a good bill. If he knew the bill to be bad, it would be like sending out a counter into circulation to impose upon the world, instead of the current coin. In this case therefore if the defendants had known the bill to be bad, there is no doubt but that they would have been obliged to refund the money. I agree with the defendant's counsel that Francis Huet was circumscribed in his authority; and, if that circumstance would protect the defendants, they would not be answerable in this action. But I am of opinion that that circumstance is not a decisive answer to this action. For I very much doubt the case, alluded to by the defendant's counsel, of the servant warranting the horse against the direction of his master; to such a case I think the maxim, *respondent superior*, applies; and the principal has his remedy against his agent, for his misconduct. But the difficulty I meet with is this, this is not an action wherein Francis Huet calls on the defendants for an indemnity; if it were, I admit that, as he exceeded the authority of his principal, he could not recover against him. But here James Huet, who is an innocent man, and not involved in the misconduct of his brother Francis Huet, has a claim on the defendants.

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When James Huet received this bill, he was informed that it came from the defendants; and, on his asking why they had not indorsed it, he was told by Francis Huet that they had done that which was equivalent to it, for that their number was on it: in this indeed he was mistaken. However he told James Huet that he should be safe, and that he would guarantee him, on which the latter indorsed his name on the bill, and thus indorsed it got into the hands of the plaintiffs. Then it is clear that the plaintiffs might resort to James Huet for payment: and that brings it to this question, Whether James Huet, who took the bill from Francis Huet, knowing him to be the agent of the defendants, has not a right to call on the defendants, who constituted, Francis Huet their agent, although that agent exceeded his authority? I think that he has. And if so, that is a good consideration for the promise made by the defendants.

ASHHURST, J.—Although I have had doubts upon this case, I am of opinion that the defendants are not liable. If Francis Huet had been the *general* agent of the defendants, I admit that they would be chargeable with his acts: but it appears from the evidence that he was constituted their *particular* agent with a circumscribed authority. And that brings it to the case put at the bar of the sale of a horse; where I take the distinction to be, that, if a person keeping livery stables, and having a horse to sell, directed his servant not to warrant him, and the servant did nevertheless warrant him, still the master would be liable on the warranty, because the servant was acting within the general scope of his authority, and the public cannot be supposed to be cognizant of any private conversation between the master and servant: but if the owner of a horse were to send a stranger to a fair with express directions not to warrant the horse, and the latter acted contrary to the orders, the purchaser could only have recourse to the person who actually sold the horse, and the owner would not be liable on the warranty, because the servant was not acting within the scope of his employment. And that is like this case: here F. Huet, who was employed by the defendants to get the bill discounted, was expressly directed by them not to indorse it, which was equivalent to saying that they would not pay it. I agree that F. Huet would be liable to James Huet, either as for money paid to his use or on the express promise to guarantee: but there it stops; for, as to the defendants, he paid the money in his own wrong, beyond the authority which they gave as exceeded. Therefore, on the whole, I think that the defendants are neither
liable

liable on account of the indorsement made by James Huet, nor on their subsequent promise to pay, because not being under any obligation, it was *nudum pactum*.

BULLER, J.—I confess that this does not appear to me to be a case of much difficulty; for, when the facts are understood, the consequences follow of course. The result of my opinion is that, as between these parties, the plaintiffs have no conscience or equity, and that the defendants are not under any legal or moral obligation whatever to pay the amount of this bill. I consider this action as a new attempt; and it is difficult to say to what extent it may be carried, if it be encouraged. In the case of a Bill of Exchange, we know precisely what remedy the holder has, if the bill be not paid; his security appears wholly on the face of the bill itself; the acceptor, the drawer, and the indorsers, are all liable in their turns, but they are only liable because they have written their names on the bill. But this is an attempt to make some other persons liable, whose names do not appear on the bill, and that under circumstances very alarming to mercantile houses through whose hands Bills of Exchange pass. For even indorsers, whose names are on the bill, can only be called on after notice of non-payment, and without delay. But if these defendants be answerable, by what rule are we to be guided; what notice is to be given to them; are they to be liable at any distance of time: I think this is a dangerous attempt, and ought to be discouraged; for in all cases arising on Bills of Exchange, there should be some limitation of time, beyond which none of the parties should be called on. In this case the defendants said in the most express terms, that they would not make themselves liable on the bill; for when they told F. Huet that they would not indorse it, it was the same as if they had told him in terms to *sell it*. When a person refuses to indorse a bill, it cannot be implied that he means to make himself liable on the bill, much less in a more extensive way than if he had indorsed it. The authority of F. Huet was circumscribed; he was mistaken in what he said to J. Huet; he did not even desire J. Huet to act on the authority of the defendants; he *thought* that the defendants would be liable; but that was merely his opinion. F. Huet therefore did not pledge the names of the defendants in any way whatever; consequently they were under no obligation whatever to promise, and it is *nudum pactum*. I agree with my brother *Ashurst*, that there is a wide distinction between *general* and *particular* agents. If a person be appointed a general agent, as in the case of a factor for a merchant residing abroad, the

the principal is bound by his acts. But an agent, constituted so for a particular purpose, and under a limited and circumscribed power, cannot bind the principal by any act in which he exceeds his authority; for that would be to say that one man may bind another against his consent. There is a class of cases, which have been thought to bear extremely hard upon masters, who are held liable for the misfeasance of their servants in driving their carriages against those of third persons: but those cases have been determined on the ground that it must be presumed that the servants have acted under the orders of their masters. But suppose a master ordered his servant not to take his horses and carriage out of the stable, and the latter went in defiance of his master's orders; there is no authority which says that the master shall be liable for any injury done to another by such an act of the servant: though indeed if the master had ordered the servant to go on a particular journey, and in the course of it the latter did an injury to some third person, the authorities, which have been determined, say that the master is liable in that case.

GROSE, J.—As I have had great doubts on this case, I am glad to have heard the opinions of my brothers before I deliver my own. The question is, whether at the time when the defendants made this promise it was *nudum pactum*, or whether there were any legal consideration for it. In the first place, this is a new attempt to make the defendants liable as if they had indorsed the bill, when in fact they refused to indorse it. The substance of the conversation between the defendants and F. Huet was this; they said “take the bill, let it be discounted, and sell it, but we will not be answerable to the holder of the bill in any way whatever.” If that be so, undoubtedly they were not liable to the holder; and their subsequent promise is without consideration, unless something passed at the time when it was made to raise a consideration. But nothing is stated to shew that the defendants received any benefit, or that the plaintiffs renounced any advantage. A strong circumstance in this case is, that at the time of the original transaction, the credit of *Gibson Johnson* was much relied on. Then there is no pretence of imputed fraud to any of the parties; and, if not, the morality follows the law. I consider this as a new and dangerous attempt to make the defendants liable, and that even beyond the extent to which indorsers are; and if we were to make them liable, it would be difficult to say what law attaches on them. As to the distinction between a *general* and

a particular agency, I think it was pointedly put by my Brother *Asbursft*, with whom I entirely agree.

Rule absolute.

ERVING and Others, Executors of J. ERVING, against
PETERS.

Debt on a judgment against the Defendant as executor for 1477*l.* 10*s.* debt, and 95*l.* damages, adjudged to be levied of the goods of the intestate in the defendant's hands to be administered, if he had so much; and, if not, then the 95*l.* to be levied of the defendant's own goods. The declaration then suggested a *devastavit*; to which the defendant pleaded, that he had not wasted, &c. At the trial a verdict was taken for the plaintiffs, subject to the opinion of this Court.

C A S E.

The plaintiffs produced in evidence the record of the judgment, by which it appeared that they had, Easter 1789, brought their action against the defendant as executor of Moffatt upon a bond, executed by Moffatt and two other persons as his sureties, to J. Erving deceased. It appeared by that record that the defendant pleaded to such action, that the bond was not the deed of Moffatt, together with three other separate pleas of payment at the day, and three other separate pleas of payment after the day, by Moffatt and his sureties respectively; and that the plaintiffs having tendered issues upon those several pleas, and issues having been joined thereon, the same had been in due manner tried in London, and verdicts found for the plaintiffs upon all the issues; whereupon such judgment had been duly given by the court as is mentioned in this declaration. The plaintiffs also gave in evidence upon the trial a writ *feri facias*, issued upon the said judgment on the 23d of January, returnable on the 10th of February then ensuing, commanding the said debt and damages to be levied of the goods of Moffatt in the hands of the defendant, as executor of Moffatt, to be administered, if he had so much; and if he had not so much, then to cause the said damages to be levied of the proper goods.

goods of the defendant. The plaintiffs further gave in evidence the sheriffs return, whereby they certified that there were no goods of Moffatt at the time of his death in the hands of the defendant, whereof they could cause to be levied the debt and damages, or any part thereof; and that the defendant had not any proper goods, whereof they could cause to be levied the damages; and that the defendant had sold, elained, and wasted, divers goods and chattles &c. of Moffatt, to the amount in value of the debt and damages. The plaintiffs gave no other evidence of a *devastavit*; and no evidence was offered on the part of the defendant. The question is, whether the evidence so given is sufficient to sustain the verdict on the part of the plaintiffs.

LORD KENYON, Ch. J.--When this case first came before the Court, they seemed to be satisfied that the plaintiffs were in strictness of law entitled to recover. It strikes me as bearing extremely hard on the defendant: but, hard as it is, he must submit to the law of the land, the current of authorities being against him. I have endeavoured to make my reason coincide with those authorities; but I confess that to this moment I have met with nothing to convince my mind. It seems extraordinary that the judgment in the first action should not be a judgment *de bonis propriis*, if the executor be liable at all events: whereas the judgment is *as to the debt de bonis testatoris*, and *as to the damages, de bonis testatoris, et, si non, de bonis propriis*. Now as the judgments given in the courts of law are the best evidence of what the law is, it should seem from this form of judgment that the executor is not liable at all events. The pleas in this case do not impute any thing unjust or unconscientious to the defendant; after the bond had been given 24 years, it was not unreasonable to plead payment, and to rest on the presumption, arising from the length of time, that it had been paid. Where indeed an executor pleads matter which is false within his own knowledge, it is reasonable that he should suffer by it: but that is different from the present case. When a defendant pleads *plene administravit*, it must be admitted now that he is only answerable to the amount of the assets proved; and yet in that case he must know exactly how his accounts stood. It seems therefore at least as reasonable that the defendant in this case should not be liable as in that where the plea must in many instances be false within his own knowledge. But in such case it was held by Lord Mansfield in *Marrison v. Beales*, that the executor is only liable to the amount of the assets in his hands. There to an action of

assumpsit the defendant pleaded *non assumpsit & plenè administravit*. It was insisted that if the plaintiff could prove assets unadministered to any small amount, the plaintiff must have a verdict for his whole demand. But Lord Mansfield said, "The law was certainly understood to be so, and there are a hundred cases so determined. This struck me as absurd and wrong; I therefore consulted my brother Denison and the other judges, who were all of opinion that the plaintiff ought not to recover of the executor or administrator more than the assets in his hands. The plaintiff proved two notes, which amounted to 80*l.* and took a verdict on the *non assumpsit* for the sum; and having proved 25*l.* assets unadministered, he took a verdict on the *plenè administravit* for that sum, and judgment *quandò &c.* for the residue." I think that decision did him great honour. However that does not govern the present case. But I find that Lord Hardwicke, in determining on this very question, found himself bound by the authority of *Rock v. Leighton*, which he observed was not accurately reported in *Salkeld*. I cannot therefore set up my judgment against the opinions of Lord Holt and Lord Hardwicke: I yield to the weight of the authorities, but not to the reasoning of them.

BULLER, J.—The reason, on which the Law has directed that the judgment in the first action shall be entered against the effects of the testator, is obvious when it is considered. The action is brought for a debt due from him; and the creditor has no right to call on the administrator or executor but in respect of the effects which he has in his hands belonging to the deceased: by law therefore the creditor is to be paid out of those effects; and unless it appear that there are none such, the proper judgment is that the debt shall be paid out of the effects in the hands of the executor. That is the ground of the first judgment by a creditor; and if so, it has nothing to do with any question that may arise on subsequent facts. The question then is, whether the executor by his own acts, and in what cases, may make himself liable *de bonis propriis*; on this the authorities are decisive, and I do not think that they are contrary to reason. The case before Lord Mansfield struck him as being singularly hard, and attended with injustice; and that noble judge thought that he was deciding on principle against the current of authorities. It is true that there were many authorities against his decision, but the doctrine there established was not new; for in some of the precedents in Townsend's judgments, there is the very form of judgment which

sh^e was given in *Harrison v. Beales*. That case however does not govern the present: here the simple question is, whether an executor or administrator who has no effects in his hands belonging to the testator, and will not take advantage of that defence at the proper time, shall be permitted to do so afterwards. Now it is an universal principle of law, that if a party do not avail himself of the opportunity of doing matter in bar to the original action, he cannot afterwards plead it either in another action founded on it, or *scire facias*. This very question appears to have been, and finally settled in the case of *Rock v. Leighton*; which I have Lord Holt's note of, and is as follows: "Mary Rock against Leighton, late sheriff of the county of Salop. upon the case against the defendant setting forth that said Pugh and others had brought an action of debt against Mary, as administratrix to her husband, Rock, upon bond of 160*l.* entered into by him in his life-time, and judgment was had against her *de bonis, &c.*; and thereupon a *scire facias* being taken out according to the judgment, and delivered to the sheriff, who levied 20*l.*, and for rest returned falsely that she had wasted the goods of the estate, and thereupon a judgment was given to have execution against her *de bonis propriis, ubi re verâ* she had not wasted the goods of the intestate that were of the value of the due of the debt. Upon not-guilty pleaded, the cause came to be tried before me the sittings after Hilary term, 15th February 12 Wil. III. Upon the evidence it appeared that upon a treaty of marriage with the intestate said Rock and the plaintiff Mary it was agreed by article in writing, that, in consideration of 150*l.* which she brought as a marriage portion, Richard Rock (if she survived him) should leave her worth 300*l.* and he covenanted with Richard Pyke, the brother of Mary, to pay the 300*l.* to her for her use, if he departed this life before Mary. Richard Rock died; Mary took out administration, and put in an inventory that amounted to 279*l.* In Michaelmas term 1694 said Pyke commenced an action of debt against Mary for 300*l.* and recovered by *nihil dicit*, and execution was taken upon the goods by a bill of sale upon a *scire facias* issued after term following at the suit of the executor of Pyke, who had recovered the judgment. In Hilary term 1694, said Pyke commenced their action in the Common Pleas against the plaintiff Mary Rock, as administratrix to her husband Richard Rock, and she let judgment go by default, and had no assets above the 279*l.* mentioned in the inventory. I was of opinion that, by letting judgment go by default

default when she might have pleaded the judgment with *riens enter mains ultra* to satisfy that judgment, which would have been a good bar, she had tacitly admitted that she had assets *ultra*, and was concluded by such her omission; for which purpose I cited the case of Kilborn and Rack adjudged in *B. R. Hill. 1657*. A judgment in debt was had against tenant in tail, who died; and *scire facias* being issued against the heir and terre-tenants, the defendant Rock was returned heir and terre-tenant, and that he was summoned; upon his not appearing, judgment of award of execution was given against him, and a moiety of the lands were extended by elegit. And ejectment being brought thereupon, it was specially found that the lands of the defendant in the judgment were entailed, and that the defendant in ejectment was heir in tail: but in regard he might have pleaded that matter to the *scire facias*, and had omitted it, he had lost the benefit thereof. So the plaintiff Mary might have pleaded the judgment at her brother's suit; that would have defended the assets that she had against the action brought by Pugh; but she, having admitted the assets she had to be liable to the action of Pugh by letting judgment go against her by *nihil dicit*, is in the same condition as if there had been no judgment against her at her brother's suit upon the covenant for 300*l*. And the sheriff hath done her no wrong; for if upon an inquiry the jury had found the *devastavit* in the plaintiff, the plaintiff upon traversing the inquisition could not have given this judgment in evidence to defend herself, because she might have pleaded it in bar of the action. This case I (having heard in my chamber, because of the consequence of it,) directed should be moved in court, which accordingly was done: and both my brothers *Turton* and *Gould* concurred with me in opinion; and so the verdict that was given for the plaintiff by consent, to be subject to the opinion of the court, was set aside. If debt be brought against an executor, and he lets judgment go by *nihil dicit* or confession, it seems to be an admission of assets. For, first, the want of assets is a good bar to the action that the plaintiff hath brought; and if issue be joined thereupon and found for the defendant, the plaintiff is for ever barred. *Hob. 199. Brickhead v. Archbishop of York, 1 Cro. 373*. Now there is the same reason that since the defendant waves pleading the matter that would have barred the plaintiff, he thereby admits the having assets. It's true that when the defendant pleads a *plene administravit*, the plaintiff may admit the plea to be true, and pray judgment *de bonis et cattallis* of the testator,

testator, *et quæ ad manus of the executor in futuro devenirent administrand'* 8 Rep. *Mary Shipley's case*, 2 Saund. 226. *Neal v. Nelson*. But that is a different judgment from what is given upon a *nihil dicit*, or a confession of the action; for that is the same as is given upon a *plenè administravit* pleaded where there is a verdict for the plaintiff, *viz.* to recover *de bonis testatoris sitantum in manibus habuit administrand'*; from which none can infer that, if he hath fully administered before, he is not affected by the judgment; but it is to be considered, that though it be found upon a *plenè administravit* that the defendant hath assets, yet is the judgment the same, and so ought to be; for if the defendant hath assets in his hands, there is no reason to levy the money upon the executor's own goods unless he hath wasted; and, that being matter of fact, it must appear upon record, and judgment must be given thereupon before his own goods can be affected. But if a *fieri facias de bonis testatoris* doth issue upon a judgment had against the executor upon a *plenè administravit* pleaded, if the goods cannot be found that were the testator's, namely, if the executor will not expose them to the execution, the Sheriff may return a *devastavit*, it being found by verdict that he had assets. Now then since the pleading of *riens enter mains* would have been a good bar to the action (and if the plaintiff should admit it, he should not have a judgment to have a present execution;) yet the defendant, by not pleading that plea, hath left the plaintiff to have a judgment upon which a present execution is to issue, which he could not have had, unless the defendant had assets; and such an admission is as good as finding of a Jury upon a *plenè administravit*. Secondly, the case of an executor doth not in this case differ from that of an heir; for if the heir let judgment go by *nihil dicit*, or confession, he admits assets. It is true the judgment is different; for an heir is chargeable upon the account of the assets which he hath in his own right, and the executor is chargeable in the respect of assets that he hath in the right of the testator; but still the admission of assets is as much by a *nihil dicit*, or confession, in one case as in the other. The like if an heir plead *non est factum*, or conditions performed, a general judgment shall be given, if the matter pleaded be found against him. So in the case of an executor, if the matter pleaded be found against him, he admits assets; for if he hath none, why doth he plead that matter; it will be enough to deny assets, and that will bar the plaintiff. Objection, *Hab.* 178. *Bird v. Culmer*. Debt against an executor

cutor who pleaded *plenè administravit*, and afterwards *relietâ verificatione cognovit actionem*. It was moved that it might be entered that he confessed assets. It was denied, because the confession can be only to the charge, which is the action: from whence it is inferred that the confession of the action is not a confession of assets. Answer. Rather the contrary is to be inferred, namely, that *plenè administravit* and a *cognovit actionem* are inconsistent; for he cannot confess the action without a *relietâ verificatione* of the *plenè administravit* so he must relinquish one to confess the other; for the one is a bar, but the other confesses all things requisite to maintain the plaintiff's action. And as to the caution of the Court, it was no more but to confine itself to the order and method of the law, which is to make a proper entry, namely, to confess the whole action." Then followed the case of *Ramsden v. Jackson*, where Lord Hardwicke thought himself bound by the authority of *Rock v. Leighton* on the very question; and the opinion of Lord Ch. J. Lee, in the case in *Wilson*, is to the same effect. Then there are three cases all determining the same point. And if an executor may plead *plenè administravit*, and neglect to do so, I see no difference between such a case, and one where he does so plead and the plea is found against him.

GROSE, J.—This case must be considered in a different point of view now, from what it must have been prior to the Statute of 4 Anne, cap. 16, § 4: before the passing of that act, the executor must either have denied the debt and admitted assets, or he must have admitted the debt, and pleaded *plenè administravit*; the consequence of which was, that if only part of the debt were due, he must have paid the whole by his own admission. But since that Statute, he may plead both as to the debt and *plenè administravit*: but if he will not avail himself of the advantage given to him by that act, and he will only deny the debt, the case of *Rock v. Leighton*, shews that he admits assets. The authorities of Lord Ch. J. Holt, Lord Ch. J. Lee, and Lord Hardwicke, are peculiarly strong, and conclude this question.

Postea to the plaintiffs.

OLD BAILEY, October 30, 1790.

Trial of EDWARD LOWE and WILLIAM JOBBINS, for feloniously burning the House of FRANCIS GILDING.

The prisoners were indicted for that they, not having the fear of God before their eyes, but being moved and seduced by the instigation of the Devil, on the 16th day of May last, at the parish of St. Botolph without Aldersgate, feloniously, wilfully, and maliciously did set on fire and burn the dwelling-house of Francis Gilding, there situate, against the form of the statute and against the king's peace.

James Flindall, after his pardon was read, for a felony he stood convicted of, was sworn.

Flindall. I was convicted in May sessions last.

Mr. Garrow. Now recollect that, in all you have to state to-day, you are not only to confine yourself to the truth, but so tell the whole truth.

A. Yes.

Q. Do you know the two prisoners, Lowe and Jobbins?

A. Yes; I have been acquainted with Lowe about eight years, and Jobbins about seven or eight months.

Q. What way of life was Lowe in at the time you was acquainted with him?

A. To the best of my remembrance, he served part of his time to his father, a turner.

Q. What was the other prisoner, Jobbins?

A. I know no more than hearsay: I heard say he was apprentice to a chymist or apothecary.

Q. Do you remember the fire in Aldersgate-street, in May last?

A. Yes; it was on the 16th of May, of a Sunday morning; the prisoners and me had been in company at Lowe's house, and several other places.

Q. State to the Court and Jury whether that fire in Aldersgate-street was occasioned by the wilful act of any persons?

A. Yes, it was.

Q. Who were the persons who set fire to that house?

A. Edward Lowe and William Jobbins, the two prisoners at the bar, and myself.

Q. Where

Q. Where was it, and at what time, that it was first proposed to do it?

A. On Wednesday, the 12th day of May, at Edward Lowe's house.

Q. Who were the persons present at the time?

A. The two prisoners and myself.

Q. What passed?

A. On Wednesday, the 12th of May, Edward Lowe and William Jobbins, in company with me, met at Lowe's house, in Hartthorn court, Golden-lane. William Jobbins then proposed to us that he had pitched on Mr. Gilding's and Mr. Berry's, as proper places to be set on fire, in Aldersgate.

Q. For what purpose were they to be set on fire?

A. With intent to rob and plunder the inhabitants, while in confusion.

Q. Did you and Lowe agree to that proposal of Jobbins?

A. Yes.

Q. When did you meet again?

A. On Thursday, at the Sun ale-house, Cow-crofs; Timothy Barnard was there likewise. We acquainted Barnard with the proposal, and Barnard went with me to Aldersgate-street: we left the two prisoners at the Sun, at Cow-crofs,

Q. For what purpose did you go?

A. With an intent to shew Barnard Mr. Gilding's house; we went through the Red-Lion-yard, which goes through into Carthusian-street.

Q. Did you observe any thing in the inn-yard?

A. There was a cart unloading trusses of clover into a hay-loft, which adjoined to Mr. Gilding's warehouse: he was a cabinet-maker, with very extensive premises. Timothy Barnard then proposed this hay-loft as a proper place to be set on fire, as it would soon communicate to Mr. Gilding's dwelling-house and warehouses, as he said, the clover not being bound so tight as hay, would catch fire sooner, and blaze up; then Barnard and me returned to the Sun ale-house, Cow-crofs; it might be about two o'clock; Lowe and Jobbins were there; we then told them that we had been to the place, and that Barnard had pitched on the hay-loft as fit to be set on fire; Barnard proposed to get some turpentine wood at the corner of the court where he lived, which, being put in among the clover, would soon blaze up; it was then agreed to meet Barnard at ten that evening, at his house in Pear-tree-court, Clerkenwell; and we went away about five o'clock: we accordingly met there at that time;

in the mean time I directed Mrs. Lowe to get a pennyworth or two of spirits of turpentine, for the two prisoners and me went to Lowe's house and Barnard went home; we then went out to get some money; we went out a thieving; but we did not get any; then we went to Barnard's at ten o'clock; before we went out a thieving, the turpentine which Mrs. Lowe bought, was mixed up by me and Lowe, and his wife, and Jobbins, with some rags and paper, and put into a glove with some matches: when we went to Barnard's he was at home, in company with his wife; when we went in he said, he had some very good turpentine wood, and me and him put some into each of our pockets; it is old turpentine barrels cut up: we all four went from Barnard's house to Shoe-lane, with an intent to set fire to Mr. Miller's, a printer's joiner's shop, which was in the back part of his house; that did not have the desired effect; we went from there to Mr. Nash's, a coach-maker's, in Worship-street, Moorfields; I gave Lowe and Jobbins some wood out of my pocket, and they went to set fire to the tables, which soon went out; then we came away, and Barnard and Jobbins went separately; I lodged with Lowe, and Lowe and me went to Lowe's house to bed, about eight or nine in the morning; we staid there till between two and three in the afternoon of Friday; then me and Lowe went to the Sun, in Cow-cross; Jobbins was there; we then proposed to Jobbins and another man that was there, one James Bond, to go out a thieving; we did so; but did not succeed: Barnard was not with us: we staid till about nine at night; and I left them in Old-street, and went to Lowe's house, to desire Mrs. Lowe to get some turpentine, and then came back to them in Old-street, and told them; then we all, Lowe, Jobbins, Bond, and me, went in company to Lowe's house, and at ten o'clock we all went in company to a court in Long-lane, which comes to the back part of a table, which adjoins Mr. Gilding's premises; Edward Lowe at that time had two picklock keys in his pocket with intention to open the padlock that is on the stable door; but could not, and therefore could not get the combustibles in; two patrols were coming past the court, and they laid hold of the two prisoners; they were taken to the watch-house; cannot say the names of the patrols; in the morning they were taken to the houses of their respective fathers; I went home to Lowe's house: I never saw Bond afterwards. On Saturday morning I got up at eleven, and went to the Sun in Cow-cross; Barnard was there; I then proposed to Barnard to go that night to set Mr. Gilding's house on fire;

fire; at that time the prisoners were not there; Barnard left me, and I continued at the Sam-ale-house till five o'clock, when Jobbins came in; me and Jobbins continued till eight o'clock, when Lowe came; Lowe said, he had been at work at his father's all day; Lowe and Jobbins went out in company with me a thieving; we had no success, and returned to Lowe's house about ten in the evening; Mrs. Lowe went out and brought some spirits of turpentine in a phial; I cannot say whether she brought them in that night, or the night before; then with the assistance of Mrs. Lowe, Lowe, Jobbins, and me, mixed some rags with spirits of turpentine, and got some matches and turpentine-wood, which Mrs. Lowe bought a pennyworth of; it was not barrels but the best we could get; and we put them all together into a glove; and the wood was put some into my pocket and some in Jobbins's; it was eleven o'clock by that time, and we three went to the Nag's head, in Aldersgate-street; we left Mrs. Lowe at home, but ordered her not to go to bed; for if she should be called, to come and assist us in taking away the plunder. We had three or four pots of beer, and two half pints of gin, and a paper of tobacco. We staid there till half past twelve, and the landlord refused to draw us any more liquor; that was one of the houses that was burned down that night. We three went out of the house with each of us a pipe in our mouths alight, in order to light the matches and set fire to Mr. Gilding's premises. A stranger to us, a customer, came out at the same time we did. We four went to Carthusian-street, down that street; and by that time two of our pipes were broken: we went to the back-gates of the Red-Lion-inn yard, which are in that street. The prisoner Jobbins got over the gates with a pipe in his mouth, which was the only remaining one; and, in getting over, the pipe was knocked out: I got over directly after Jobbins, and he gave me the pipe: the gate is an old wooden gate, with holes in it; I gave Lowe the pipe through the hole to get lighted, and he returned with it to me lighted; but in the mean time Jobbins went down the yard, and placed a ladder, which he found near the hay-loft, against the hay-loft door, which was the hay-loft pitched on by Barnard and me; then Lowe returned with the lighted pipe, and gave it me through the gate; I then went down the Red-Lion-inn yard with a pipe, and gave it to Jobbins, at the end of the ladder: the pipe went out as before: he gave me the pipe again, and I returned it to Lowe, which he lighted again, and banded to me through the gate; and at the same time he gave me some matches,

atches, which I gave to Jobbins with the pipe. I then went down the yard with Jobbins to the stable; then Jobbins went up the ladder with the pipe in his mouth, and he matches in his hand, into the clover loft; when he lighted the matches, and set fire to the combustibles, which we had laid before, in my absence, among the clover-hay. When I went for the pipe, I saw him go up the ladder: the combustibles soon blazed up. Jobbins and me came back, and got over the gates of the Red-Lion yard into Carthusian-street: Lowe was then waiting at the gates, and desired me to go to his house for his wife: the fire then raged. I went to Lowe's house, and found Mrs. Lowe lying down in her clothes; she returned back with me to the fire, which was then burning very rapidly: Mrs. Lowe and me returned in about twenty minutes. I left Lowe and Jobbins at the fire. We then went down the Red-Lion yard, where Lowe was in a house bringing out boxes and rings; the alarm of fire had been given, and people assisting. I then assisted, with Jobbins and Lowe, and Mrs. Lowe, to carry away the things that came out of the houses; carried several things away into Aldersgate-street buildings, in company with Lowe and Jobbins; they were left in the buildings, in the care of a watchman. I then went back again to Mr. Gilding's, which was on fire; this was about an hour and a half after the first blaze. I went up into Mr. Gilding's dining-room, and brought down a vase case, containing about two dozen silver table-spoons; there was one ravy-spoon, and about a dozen dessert-spoons. I went through the mob with it under my arm, to an inn-yard, took out the spoons and put them in an handkerchief, and hrew the case under the gateway. I then went home with the spoons and the handkerchief to Lowe's house, in Hartford-court, Golden-lane, Old-street, about five or ten minutes walk from the fire; I put them in a cupboard under the stairs, on the right hand side. I then returned back to the fire; and the prisoners had brought a great many things, from different houses, into Aldersgate-street-buildings: I met Lowe coming with two drawers, which he carried to the buildings; I proposed to call Barnard then, and left Lowe and Jobbins at the fire, and went to Timothy Barnard's house; he came out directly as I knocked. Barnard came with me to the fire; I shewed him the property in Aldersgate-street-buildings; he said, Here is something like, indeed! Then Lowe came, and Lowe and me desired Barnard to fetch a cart; and I left Lowe to mind the things, whilst I went with Barnard to fetch a cart: we could not get one
and

and came back to Lowe; then Barnard proposed to us, to get what things away we could, without a cart; and Lowe brought the two drawers I met him with before, which were the property of Mr. Gilding, on his head, to the bottom of the buildings, and took them towards Sutton-street, in the way to Barnard's house; and he desired Barnard and me to follow him, which we accordingly did: he then carried them into St. John's-street, near Sutton-street, and Barnard then lifted them off Lowe's head on to mine; and Barnard then desired me to follow him to his house. I followed Barnard till I came to New-prison Walk, which is near his house; Lowe and Barnard accompanied me; where I was stopped by an officer, named Mr. Lucy, with the two drawers on my head; Barnard walked off directly, and Lowe stood still by me, and was brought in afterwards by Lucy to the New prison. There was a blanket over the drawers, to prevent people seeing what they were. Lowe and me were committed for trial. On the Sunday, Mrs. Lowe came to the prisoner Lowe and me, and brought us fourteen shillings, which in the presence of Lowe she said was part of the price of four spoons, which she said she had received of Jobbins as part of a guinea which the four spoons fetched; that was our two-thirds of the guinea; the other seven shillings belonged to Jobbins. She said Jobbins told her he had sold them in Chancery-lane, but would not tell where. Jobbins was usually called by us the Little Doctor. I then told her to go home, and she would find in the cupboard under the stairs some silver spoons, which these four were part of. The next day she returned to me and Lowe, and brought us three pounds fifteen shillings, which she said was the money she had received for the spoons, of Mr. Samuel, a Jew, whom we knew; and she never gave me any of the money, but took out a pair of stockings for me from pawn, that was two shillings. Then we were committed to Newgate, and I had at different times a few shillings; and some victuals that I had, she paid for it. The bill was not found against Lowe. I was tried, convicted, and have received my pardon.

Mr. Garrow. That is material; he was not tried for stealing the plate, he was indicted for stealing the goods of Mrs. Woodley in the dwelling-house of Mr. Gilding; the Jury found him guilty of stealing, but not in the dwelling-house.

Flindall. I was ordered for transportation: I discovered this about six weeks after I was sentenced; I made no discovery of it before. I wrote a letter to Mr. Alderman Skia-

Skinner; in the ward I was in, there was a person I thought I could depend on as a friend, not to hurt myself more than I was, and got him to write a letter to Alderman Skinner; I told him the whole circumstance; his name is Wilkins.

Q. Is the story you have been relating to the Court and Jury the truth?

A. Yes.

Q. Are these the two persons that had the share in the transaction you have been describing?

A. They are.

Cross-examined by Mr. Knowlys.

Q. Now, Mr Flindall, on Wednesday, which was three entire days before the fire happened, was the first time this scheme was concerted?

A. For that place.

Q. You say it was the Thursday before you communicated it to Barnard?

A. Yes.

Q. Barnard then alone went with you to view the premises?

A. Yes.

Q. It was not Barnard's original scheme, nor was he present at the commission of the offence?

A. No.

A. I should think it then a little odd that Barnard was the person that was with you to view the premises and to concert that scheme?

A. It was so.

Q. During this interval you certainly amused yourselves in going to search after the execution of plans of robbery?

A. Yes.

Q. What time did you leave the Sun on Thursday?

A. Between four and five.

Q. At the times you were there, was the house full of customers, or thin?

A. There might be two or three besides us; the tap-room never was over and above thick of company; but the business was settled how it was to be conducted, as we were going to view the place; Barnard and me concerted the scheme, and communicated it to the two prisoners.

Q. What hour was the first meeting at the Sun when you were all together?

A. About eleven or twelve.

Q. Was the room thin or full then?

A. There

A. There were not many people there; there might be three besides us.

Q. At what time were you all four there again?

A. About two o'clock; we were there about half an hour, or more; there were not above two or three people there then, and we had not more than a pot of beer.

Q. On the Friday, after Barnard left you, how long did you and the two prisoners remain there?

A. Till five o'clock; we were not all the time in that room we went backwards in the skittle-ground.

Q. Was the room thin or full during that time?

A. There were two or three, or four, people going in and out; the room got full and empty again in the time that we continued there.

Q. You say, when you was taken by Lucy, Lowe stood still?

A. Yes.

Q. He was found immediately on Lucy's going out again?

A. Yes.

Q. You were in the same gaol together?

A. Yes.

Q. How have you maintained yourself before that Wednesday?

A. By different other robberies, in company with the prisoners.

Q. For what length of time had you maintained yourself by a course of robberies and plunder on the public?

A. About eight weeks.

Q. What way of life was you in before?

A. I followed the sea for some time.

Q. Do you mean to confine your course of robberies to seven or eight weeks?

A. With these people; I have been out before.

Q. What has been the course of your life for these last three years? Has it not been a course of robbery and plunder?

A. No, not three years.

Q. How much of the three years.

A. About two years.

Q. How often have you been in custody, during that time, on various accusations?

A. Once before within the two years.

Q. Did not you fear that the plan of burning houses might be fatal to the lives of many people in the night?

A. With

A. Without a doubt I did: but the plan was not proposed by me: when I saw the fire, I cannot say but it shocked me very much, but not before, not the idea of burning people.

Thomas Duggin sworn.

I keep the new Sun, in Cow-Cross. I believe the prisoner Jobbins used the house before I took it.

Q. Have you seen Flindall at your house in company with the two prisoners?

A. To the best of my knowledge I have.

Q. Do you remember seeing the prisoners at the bar at your house on the Thursday before this fire happened?

A. I cannot say I do, not to be positive; but I suppose I have, as they used to come in and out.

Q. Do you know the wife of Lowe?

A. Yes.

Q. Has she been at your house in company with her husband, or Jobbins, or Flindall?

A. I think she has, to the best of my recollection.

Q. Did she ever leave any thing at your house?

A. When Flindall and Edward Lowe were in prison, she called at my house, and left a pistol in my custody.

Q. What was to be done with it?

A. She left it with me till somebody should call for it; I do not recollect that she mentioned who.

John Burrell sworn.

Q. Is your name John Burrell?

A. I cannot positively say; they call me so. I am servant to Mr. Thomas Duggin, at the Sun alehouse, Cow-cross.

Q. Have you seen Flindall and the prisoners at your master's house together?

A. Not to the best of my knowledge; I might, but I cannot pretend to say.

Q. You have seen them at your master's house?

A. Oh, yes, two or three times.

James Edwards sworn.

I am a watchmaker; I live in Barbican: I was at the Nag's-head ale-house in Aldersgate-street, the night of the fire.

Q. Look at the prisoners; were they there that night?

A. I cannot say to Lowe; Jobbins, I am sure, and Flindall were there; I cannot recollect Lowe at all.

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Q

Q. Were

Q. Were there other persons in company with Flindall and Jobbins.

A. There were.

Q. About what time did you leave the house?

A. I believe ten minutes after twelve, as near as I can recollect.

Q. Did you leave Jobbins and Flindall, and their companions, there, when you went away?

A. I cannot be sure whether Flindall was there when I went away, but Jobbins walked round the room with a pipe in his mouth, and I believe he went out of doors; whether he went away or not, I do not know. I was just going to get into bed when I was alarmed by the fire.

Benjamin Williams sworn.

I keep the Nags-head, in Aldersgate-street; I was burnt out: I remember the night of the fire beginning. Lowe and Flindall went out of my house about half after twelve on the night of the fire. They had been there some time that evening; and they had either three or four pots of porter, and one if not two papers of tobacco; I can say but to one; they had some pipes, they had half a pint of gin, and they wanted a pot of porter after I had locked up my bar and my cellar; I refused drawing them any more liquor; Flindall pressed very hard for half a pint more gin, but I said I would sell no more. I cannot say that Mr. Edwards was there, nor whether the prisoner Jobbins was there. I was in bed in five minutes after they went away. I was alarmed about one o'clock. The back part of my yard adjoins Mr. Gilding's premises.

John Russell sworn.

You are one of the watchmen belonging to the Charter-house square?

A. Yes.

Q. How near are you to the gates of the Red-Lion?

A. I cannot say: there is a gate to the Square? I do not go beyond those gates: it is a wooden railed gate, an open gate; you may see through it: the Red-Lion gate is about six yards from my box.

Q. Do you remember the night that the fire happened at Mr. Gilding's?

A. Yes.

Q. In the course of that night, and before the fire, did you hear any thing that caused your attention?

A. No.

Q. No, Sir, nothing till I had done calling half after twelve; then I thought I heard a foot-step in Carthusian-street; I went to look through the gate, but I could see nobody; but I directly saw the fire.

Q. How long does it take you to go round and return to your box?

A. Sometimes more, sometimes less; sometimes ten or twelve minutes. When I saw the reflection of the fire, I look upon it to be three quarters after twelve; it was beyond the half hour, but could not tell exactly, as we have no chimes to the Charter-house clock; it was before one.

Q. Where did the reflection of the fire come from?

A. From the Red-Lion yard, from some stables; it had just got a little above the tiles; I suppose it had been some time before it could get through the tiles.

Q. What sort of a gate was there to the inn-yard, at that time in Carthusian-street?

A. A wooden gate.

Q. Could a man easily get over it?

A. Yes, very easily. Because there was a part of the wall broken down by people getting over, some that belonged to the yard, such as coachmen and others; it was easy enough to get over there.

William Kyme sworn.

I kept the Red-Lion inn: I went to bed about a quarter after twelve: in the morning, about a quarter before one, I was alarmed with fire, by the watchman; I saw a very bad fire in a hay-loft, over a flour ware-house of mine, adjoining to Mr. Gilding's premises; there was clover-hay chiefly in the loft, and some straw and meadow-hay; there was clover brought in three successive days before the fire happened, on Thursday, Friday, and Saturday; there was a ladder locked to the side, that nobody should take it away to any other place; it was to go into the loft.

Q. Was it easy to place the ladder so as to get into the loft?

A. Oh, yes, very easy; it was for that express purpose. I secured my property in my iron chest, in my bed-room: I went down to fetch a candle; and in about a quarter of an hour after I was alarmed, and I left two or three of my doors open; and very soon after I returned, which was a little after one, this Lowe and Flindall came into my bed-room; I asked them what they wanted, and they said they come to assist me: I told them they were two thieves, I said they were nothing but thieves; and I told them I supposed

Q.

they

they came to rob me: then they said they were no such thing as that; they came to serve me, and they would assist me; and I wanted somebody to remove my iron chest further from the fire, and they did assist in that; then they wanted to help me to take my beds and other things away; I told them they should not touch them, I wanted no further assistance from them, for I suspected them to be nothing but thieves, and they should not meddle with any thing; then they went off, and I had nothing to say to them. I am quite sure that Flindall and Lowe were the two persons.

Thomas Collins sworn.

I am a constable; I attended at the fire in Aldersgate-street; I saw Lowe there; I went there about three, and it was some time after I was there, about half an hour or three quarters of an hour, he was walking backwards and forwards by the end of Aldersgate-street Buildings; there was a parcel of goods brought from the fire, and a watchman in care of them. I saw Lowe twice or three times walking backwards and forwards; he past by the end of the Buildings, and I went as far as the Vine-Yard: I believe Lowe saw me; I went there on purpose; I knew Lowe before, that made me take notice of him; I looked at him to see what he was after, as I did some other people; I am positive he was there; I know Flindall, I know Jobbins; I cannot say I saw either of them at the fire.

Harry Moray sworn.

Q. You remember the fire in Aldersgate-street?

A. Yes, I was there about one o'clock.

Q. Look at the prisoner Jobbins, and see if you know him?

A. Yes, I do.

Q. You have no doubt of him?

A. None at all.

Q. Did you see him at the fire that night?

A. Yes, in different parts, by Mr. Gilding's, and one time at another house; it was half after one or two when I first saw him; it might be half an hour between one time and another.

Thomas Burgin sworn.

On the sixteenth of May last I was a servant to Mr. Gilding.

Q. Look at the bar, and tell us whether you saw the prisoners at the fire?

A. I

A. I saw Lowe only.

Q. Did you see Flindall there?

A. No; some time after he was getting out the things, I came out of my master's house with some things, and put them across the road; and going back for more, I saw some linen, which turned out to be sheets, coming out of my master's window up two pair of stairs; I caught hold of the sheets; Lowe immediately told me I had no business with them, for he was Mr. Gilding's servant; I immediately looked him in the face, and told him he was not Mr. Gilding's servant, for I was, and if he was also, I should know him. He still insisted on the things, for I had no business with them; some gentleman came up to him, and told him to let go the things, for they knew me to be Mr. Gilding's servant; he immediately let go of them, and went about his business.

Joseph Douglas sworn.

I am a turner; I remember being at the fire in Aldersgate-street; I know Mr. Gilding's counting-house. (*The prisoner Timothy Barnard ordered to be brought up.*) I saw a person coming towards Mr. Gilding's counting-house, whom I have seen in custody. (*Barnard brought in.*) I am positive that is the person; I gave him a book to deliver at Mr. Blackburne's, and I followed him; I was close behind him; I saw him go another way; I immediately delivered the book to Mrs. Blackburne, and followed him, and he came back and delivered it; I am sure that was the man, and, to the best of my knowledge, it was about two o'clock.

John Garter sworn.

I am servant to Mr. Gilding; I know Timothy Barnard; I saw him there; he was in Mr. Gilding's counting-house; I gave him several books to carry, but I do not know where they were carried to; I had a box on my head, and Barnard wanted to carry it; he said he belonged to them; I said, so did I, and I would not let him have it.

John Hewit sworn.

I was at this fire; I saw Edward Lowe there; he was coming from the fire with a box on his shoulder; Robert Newman, the constable, stopped him, and said you shall carry it no further, and he pointed to Aldersgate-street Buildings, and made him put it there; I am sure he was the man.

John

John Lucy sworn.

I am a peace officer; I was in Aldersgate-street after the fire happened; I know Flindall and Lowe. In the morning of the 16th of May, about five o'clock, in St. James's Walk, Clerkenwell, at the end of which is Short's Buildings, I observed two men coming after me with some property on their head, and there was a third person looking into a garden; I waited till they came up Short's Buildings; I went up to Flindall, who had on his head two drawers, with wearing apparel, covered with a blanket: having heard of the fire, I suspected them: I asked the person, which was Flindall, what he had there? He said some property from the Red Lion-inn yard, and was going to N^o 12, Pear-Tree-Court. I laid hold of him, and took him and the property into New-Prison; I was then close to the gate; I came out of the prison, and found Lowe near where I had left him; he was without his hat, and his coat wet; I secured him; he said he had been at the fire to assist the sufferers; I took him into custody; Flindall was afterwards tried and convicted for stealing the goods; the bill was not found against Lowe.

Edward Mottram sworn.

I am a constable of Aldersgate Ward; I think I know both the prisoners well; Lowe, I am positive, was in my custody about the middle of May, and, I am persuaded in my own mind, Jobbins also, but I am not so positive to him; in going round the Ward, the two prisoners I took up a little passage; I saw a person or two up the passage, and being an unseemly hour, I took them into custody, as suspicious characters; I called the patrol; I took them to the watch-house; I searched them, and found nothing; I asked them where they lived, and they gave me a verbal direction; I went home with Jobbins to his father's house, who rents a little tenement of one Brown, in Goswell-street; and took Lowe home to his father's house in Bridgewater-Gardens; I cannot say particularly what night this was.

Joseph Samuel sworn.

I live in Still-Alley, Houndsditch. I bought some silver spoons of Mrs. Lowe, the wife of the prisoner Lowe, as far as ever I understood. Ten or eleven dessert and table silver spoons, and among them one long narrow spoon, which I believe is called a marrow-spoon. I cannot tell
whether

whether she had more, but I bought all she shewed me: I paid her 3*l.* 15*s.* they were at 4*s.* 10*d.* an ounce. I sold them afterwards to a man that deals abroad, for 5*s.* 2*d.* an ounce. The first time I saw Lowe after, was the day he was discharged: he had no hat on, and his coat under his arm. He said, I am come on purpose to speak to you. He then said, Mr. Samuel, if you have got any of those spoons that you bought of my wife, that came from the fire in Aldersgate-street, I beg of you for God's sake, to make away with them, for I think Jem Flindall will be a rogue: for, says he, the day that Jem Flindall was arraigned at the bar of the Old-Bailey, he sent me down a letter, and required eight or nine shillings of me, that he then wanted: and in case I did not send it to him, he threatened to tell the Judge the whole affair; and in case Flindall was hanged, he said I (meaning Lowe) should be hanged along with him. I then said, it is something amazing to me that you should be afraid of Flindall's being a rogue, there is nothing to affect you: you are discharged, and at your liberty; in what can he hurt you? And he then said, there are other circumstances in the way. I then begged of him to tell me what he was afraid of: he was a long time hesitating; but at last he said, I may tell you, that I, Flindall, and the others, set them houses in Aldersgate-street on fire, and I now intend to go on board of ship. He then said to me, I think, Mr. Samuel, you have used me rather ill. In what? says I, Why, says he, concerning the money you gave my wife for the silver; for, says he, I think that twenty spoons certainly come to more than 3*l.* 15*s.* for, says he, the little doctor (by which name we called Jobbins) had sold some of the dessert spoons, which were the smallest, to a person in Chancery-lane, for 7*s.* a piece, and had sent Flindall and him 14*s.* and kept 7*s.* to himself. I then told him, says I, I tell you what, Mr. Lowe, your wife will never tell me to my face that I bought twenty spoons, for if there had been twenty they would have come to more money. He then said to me, I think, Mr. Samuel, I have been very lucky in this business; I said, how lucky? He said, I may say I have saved my life twice; I asked how? Why, says he, I may say I have saved my life now, by being acquitted; and, the first time, when the fire was in the house of Mr. Gilding, I entered the house and run up stairs, and I had scarcely been a minute in the room, before it was all in a blaze, and I was forced to make my escape out of one of the windows, and I was caught by the mob. I gave him half-a-crown, and declined going with him.

Q. Did you see Lowe again after that?

A. Yes; some days afterwards, I was coming from the Borough across London-bridge, I met Lowe coming towards me; I hardly knew him; he had on a canvas jacket, and a pair of nankeen breeches; he said he was going down that evening. Down, says I, where? Says he, to the Nore, on board of ship; and he asked me if I had heard any thing concerning Flindall, about the business (which I understood to mean the business he had been talking of)? I told him no, I had not troubled myself about it; he asked me to give him something to drink; and I took him to the dram-shop in Thames-street, and we had a glass a-piece; and from that time I have not seen him, till I saw him in Guildhall. My wife was present only a short part of the time, for she was very ill.

Cross-examined.

Q. How long have you known Flindall?

A. Five or six months.

Q. How often has he been at your house?

A. Pretty often.

Q. That is to say, bringing you the result of his plunder?

A. Yes, I suppose it might.

Q. How long has your house been a house for this purpose?

A. I do not know that my house has been resorted to but by these people. I have been a general dealer in an honest livelihood, which I can prove, though I have been under the lash of the Court.

Q. You know very well, that by giving evidence, you save yourself from prosecution.

A. Certainly; but I came voluntarily several hundred miles; I was not sent for; and my wife came up voluntarily too.

Elizabeth Samuel sworn.

I am wife of Joseph Samuel. I remember the fire in Aldersgate street, on the 17th of May; I saw Mrs. Lowe at our house; my husband had been out, and he came home with Mrs. Lowe, and brought some silver spoons, and my husband weighed them, and paid for them.

Q. After this, did you see Lowe at your husband's house?

A. Yes, some time after Lowe came to my house without a bar, and spoke something to my husband, I do not know what; and he came to me, and he said, Mrs. Samuel,

muel, If you have any of those spoons that your husband bought of my wife, make away with them, for they came from a place that we set alight in Aldersgate-street; and he said he was going on board a ship.

Lloyd Garfide sworn.

I live in St. John's-street. I saw the prisoners the day of the fire facing my door. St. John's-street is in the way from Mr. Gilding's to Pear-tree-court.

Q. Look at Flindall?

A. He was with Lowe and another; there were three in company; I cannot swear to the third person. (*Barnard brought forward.*) He is very much like him, but I cannot be certain: it was about five in the morning; they were all three together: they were coming down Sutton-street, past my door, and toward Clerkenwell; one of them carried something on his head, covered with a sort of a cloth. Lowe carried it, and by my door he gave it to Flindall.

Elizabeth Burden sworn.

My maiden name was Woodyere; I was servant to Mr. Gilding at the time of the fire in Aldersgate-street; I lost my wearing apparel; these were the drawers I had to put my clothes in, and there were articles of wearing-apparel in them; they were in the garret; those drawers and things were a part of the property lost; they were returned to me; they are the same that were lost, and the same that were produced on the trial of Flindall.

John Richards sworn.

I am in the employ of the Sun-Fire-Office; I was present at the apprehension of Lowe: he was on board the Brunswick, entered by the name of Edward Price; I inquired both for Lowe and Price; he answered to the name of Price, and insisted upon it to me that his name was Price, and not Lowe. I told the commanding officer he was the man I wanted, and he was delivered to my orders. The other prisoner was apprehended on board the Crescent; the officer said, in his hearing, his name is not Jobbins, his name is Burne; he was secured; the ships were both at Spithead.

Jane Gilding sworn.

I can swear to the drawers; I know there were twelve table and twelve dessert spoons in a vase case; and there might be a marrow-spoon in it, there frequently was.

DEFENCE.

Edward Watfon sworn.

I am a journeyman watch-finisher; I have known the prisoner Jobbins ten years, from his first going to St. Paul's School; I never heard his character impeached; he was employed in the medical line, as a surgeon and man-midwife; his father gave seventy guineas with him.

Q. Did you ever apply to him in that character?

A. I did once, on the Saturday, at his father's house; previous to the fire; the fire happened on the Sunday morning; he was not at home in the evening; I waited for him; I saw him.

Q. What time did he come home, that you had the opportunity of seeing him?

A. It was past twelve o'clock.

Q. How long had you waited at the house for him?

A. Very near two hours.

Q. Did the son reside at the father's?

A. He did.

Q. Where is the house situated?

A. Opposite Charter-house-wall, Goswell-street. It was just turned twelve when he came in. He made me up some pills.

Q. Did he go away with you when you went away, or did he remain at home?

A. He remained at home.

Q. Was the father at home?

A. He was; nobody lives in that part of the house but the father and son.

John Jobbins sworn.

I am the father of the young man at the bar: I live in Goswell-street, in a house of Mr. Brown's; his door fronts one way, and mine the other; there is no communication; it is a separate house; I have lived there about six years; I have only one son; I keep no servant; my income is but small; I am a king's locker at the Custom-house.

Q. Did your son live at home with you at the time of the fire?

A. He did.

Q. Do you happen to know in what way he disposed of his time for several days preceding the fire; during the week?

A. S.

A. He was at home always when I came home, at three o'clock; the former part of the day, I can give no more account of him than you; I go to my duty at nine o'clock, sometimes not till ten or eleven; he was at home when I was there; sometimes I came home at half after two.

Q. On Saturday, when you returned home, and from three o'clock the day of the fire, was your son at home?

A. He was at home, writing, and had been writing for the week before; he was writing a chronicle; he continued at home till between seven and eight; I was at home all that time, when I desired him to go to the White Horse-Cellar, to see for something that I expected from Gloucestershire, which was to lay there till called for; he did not find any thing; and he did not return till a little past twelve; in the mean time a Mr. Watson came about nine o'clock that evening; he asked me if my son was at home? I told him no, but he would be in presently, I dare say; he said he was going farther, he would call as he came back; he returned about eleven; he waited till it was a little past twelve, when my son came home.

Q. Do you know the nature of his business with your son?

A. He asked him if he could make him up something for a strain? My son told him if he would wait about a quarter of an hour, he could; accordingly he made some pills in a box, and he paid him; I saw him.

Q. When Mr. Watson went away, what became of your son?

A. He went to bed with me; he had not been in bed half an hour, before the alarm of fire was.

Q. How long was it before he got up?

A. Half an hour I believe; and he got up and said, there was a fire; says he, I will run and see it; I said, do not go, for you may be hurt; he said he would take care not to be hurt, and he would not stay long.

Q. Do you know the time he returned?

A. No, I cannot say I do, for I had been asleep, and I had no light.

Q. Did he return to bed?

A. He did.

Q. Was he in bed with you when you awoke?

A. He was.

Q. What became of him on the Sunday?

A. He was at home all day on Sunday, and until Monday, past nine, till I went to my office.

Q. Who was your son apprentice to?

A. Mr.

A. Mr. Cowley; he is dead; since then he has lived with me; Mr. Cowley was a surgeon and apothecary; I gave fifty guineas with him, and all expences.

Q. Was your son a studious and attentive young man?

A. Oh, very; he understood Latin very well, and the anatomical science; sometimes for three weeks together he was studying in his profession, and composing things.

Samuel Trowse sworn.

I live N^o 2, Lombard-street: a buckle maker. I have known young Jobbins four years and upwards. All that I knew in the different times he has been at our house, was always good and like a gentleman.

Q. Was his character that of an honest lad?

A. I believe so.

Q. Was you present at the examination before the magistrate?

A. I was at the first and second time.

Q. At the first examination did you hear Mrs. Joseph examined?

A. Yes. When Alderman Skinner asked her whether she knew that young man? she said, she did not; he asked her again, and a third time, with this addition to her, refresh your memory; do not you know the Little Doctor? She said, I do not; then Alderman Skinner said, then you mean to say, that you do not know him in any thing? And she said, she did not.

Thomas Browne sworn.

I know the father of the prisoner Jobbins; he has had a part of my house five years.

Q. What is the character of the young man?

A. I never heard any thing amiss of him; I only saw him go backwards and forwards to his father; I have not seen him twice for these twelve months: I never heard his character impeached; I am about my business; and the father and they come home in the evening.

John Adley sworn.

I am a linen-draper in St. James's-buildings. I have known young Jobbins about four years; I never heard any thing against him till this time; he always bore a good character.

Edward Moriah sworn.

I have known Jobbins seven years, to the best of my knowledge; I never heard any thing amiss of his character.

For the Prisoner Lowe.

Edward Lowe sworn.

I am the father of the young man at the bar. I am a turner, N^o 8, Bridgewater-Gardens: I employed my son, and paid him wages, and did so the whole of the week this fire happened: I paid him that Saturday twenty shillings, between nine and ten; I returned home at that time: he does not live with me: he has a wife to support. I know he was at work at eight that Saturday night, because my work was not finished when I went out, which was about eight, and when I returned it was; when I went out, I said to him, Ned, get on with this job for next week; but I did not examine it on my return: he sometimes might earn twenty shillings, twenty-five shillings, thirty shillings, or fifteen shillings a week, just as he pleased.

Q. Do you know who lodged with him?

A. I understand, Flindall.

William Clunn sworn.

I am an engraver and an enameller; I know the prisoner Lowe, and have known him five or six years; I never saw any thing but industry by him; I live opposite to his father, and have seen the prisoner at work early and late; I never heard his character impeached before this.

Thomas Porter sworn.

I live at St Thomas's, in the Borough: a mathematical-instrument maker; the prisoner Lowe was my man, and worked for me a twelve month ago; I never heard any harm of him, while he was with me; I always reckoned him an honest hard-working young man; I have not seen him above once or twice since.

Mary Field sworn.

I live in Cow-lane, Smithfield; I burnish gold and silver plate; I have known him fourteen years, a very honest lad; I never heard any thing to the contrary. I know Flindall's character has been a very general thief; I had an apartment at Flindall's father's twelve years ago, and I quitted the house on account of the bad character of his father and mother.

The Recorder summed up the evidence. The Jury conferred a short time, and, without going out of Court, returned their verdict, Both Guilty.

They accordingly received sentence of Death, and were executed in Aldersgate-Street.

CROWN

CROWN CASES.

JOHN SHEPPARD'S CASE.

At the Old Bailey, September 1781, John Sheppard was tried before Mr. Justice *Ashurst*, for uttering the following order for payment of money, knowing it to be forged, with intention to defraud James Elliot.

"Green-Street, 31st July, 1781.

"Messrs. Brown and Collinson,

"Pay to Mr. John Atkins, or Bearer, six pounds six

"shillings for

H. Turner."

The prosecutor was a silversmith; and the prisoner having looked out several goods at his shop to the amount of six guineas, pulled out his purse, saying, "I believe I have not cash enough about me, but here is a draft on a Banker, which is the same thing as money; it will be paid when presented." He laid the draft on the counter, and desired to see some silver spurs; but the prosecutor not having any of the kind which he described, the prisoner said, "Then you must send me a pair." The prosecutor took his order-book, and imagining the prisoner's name to be the same as that in which the draft was signed, he wrote, "H. Turner, Esq." The prisoner looked over him, and desired him to add, "J^{nr}. Noah's-Row, Hampton-Court," and then went away. It appeared that no person of the name of H. Turner kept cash at Brown and Collinson's, or lived in Green-Street; nor could such a place as Noah's-Row, or such a person as H. Turner, jun^r. be found at Hampton-Court.

The Jury found the prisoner *Guilty*; and he received judgment of death: but the execution of the sentence was respited, and the propriety of the conviction submitted to the consideration of the Judges.

In January Session, 1782, the prisoner was put to the bar, and informed by Mr. Recorder, That the Twelve Judges were unanimously of opinion, that the conviction was legal. The prisoner however received a conditional pardon, in consideration of the long confinement he had suffered; and he was sentenced to Hard Labour for three Years.

JOHN

JOHN HEVEY'S CASE.

At the Old Bailey in January Session, 1782, John Hevey was indicted on the statute 2 Geo. II. cap. 25, before Mr. Justice *Ashurst*, for forging an indorsement on the back of a Bill of Exchange, in the name of "B. M'Carthy," with intent to defraud William Masters and Edward Beauchamp.

There was a second count, for uttering and publishing a forged indorsement, in the name of "B. M'Carthy," with the like intention.

"N^o 59. £. 30:00:0. Bath Bank, Nov. 19, 1781.

"Thirty-one days after sight, pay Mr. Bernard M'Carthy, or order, thirty pounds, value received, for Smith, Moore, and Co.

"Jer. Connell."

"To Ric. Beatty and Co.

"N^o 19, Gt. St. Helens, London." (*Acc. R. B. and Co.*)

It appeared in evidence, that the prisoner, by the name of John Hevey, had procured the copper plate to be engraved from which the skeleton of the bill in question had been printed. In the month of November, 1781, the prisoner went to the shop of the prosecutors, who were pawn-brokers in Holborn, bargained for a gold watch, at the price of eighteen guineas, and offered the Bath Bank Bill above described, in payment. Mr. Beauchamp examined the bill, and shewing the indorsement to the prisoner, asked him if his name was M'Carthy. The prisoner replied, "Yes, Sir it is. You have no occasion to be afraid, it is better than a note of the Bank of England; it is a very good bill, and I have indorsed it." Mr. Beauchamp, however, refused to take it, until he had sent his servant with it into Great St. Helens's, to know whether the acceptance Richard Beatty and Co. was genuine. The servant took the bill according to the directions, and received information from a gentleman who answered to the name of Beatty, that it was a good bill, and would be regularly paid when due. In consequence of this information, the prosecutor let the prisoner have the watch, gave him 11*l.* 2*s.* in exchange, and a bill of parcels, with a receipt in the name of M'Carthy for the 18*l.* 18*s.* 0*d.* The bill was not paid, nor were there any such persons as Smith, Moore, and Co.

to be found at Bath. The prisoner and Beatty were apprehended, and committed for the supposed forgery. In the prisoner's custody were found a number of notes, of different dates and sums, indorsed in the name "B. M'Carthy;" but it was positively sworn, that these indorsements, as well as that on the back of the bill in question, were in the hand-writing of one Bernard M'Carty, who lived in St. Giles's, and had absconded.

The learned Judge directed the Jury upon the points of law; and they found a verdict, "That the indorsement *"B. M'Carthy"* was in the hand-writing of a person of that name, but that *John Hevey*, the prisoner at the bar, had passed himself upon the prosecutor Mr. Beauchamp, as being *"B. M'Carthy"* the indorser."

As this finding involved a question of law which had never precisely received a judicial determination, the question was referred to the consideration of the TWELVE JUDGES, Whether, if a man produces the real signature of a person existing, purporting to be the indorsement of such person, and falsely declares that he is the identical person whose indorsement it purports to be, it amounts, in point of law, to the offence of forgery?

On the first day of Hilary Term, 1782, eleven of the Judges conferred upon this case; and at the Old Bailey in February Session following, Mr. Justice Gould delivered their unanimous opinion, That it did not amount to forgery. The statute 2 Geo. II. cap. 25, says, "That if any person shall *falsely make*, or cause to be *falsely made*, any indorsement, &c. they shall be guilty of felony." There must therefore be a *false making* to constitute the crime of forgery; but, in the present case, the Jury have found that the indorsement was *truly made*, by a real person whose name it purported to be.

The prisoner however was detained, and at the same Session Hevey and Beatty were indicted, with M'Carthy, for the conspiracy, and convicted.

THE

LAWYER'S

AND

MAGISTRATE'S MAGAZINE,

For DECEMBER, 1790.

C A S E S

In the COURT OF COMMON PLEAS, TRINITY
TERM, 30 GEO. III.

HOME v. Earl of CAMDEN and Others.

JUDGMENT delivered by Lord Loughborough in the above
Cause, June 23, 1790.

THIS Case came before the Court on a suggestion for a prohibition to the Lords Commissioners of Appeals in Prize Causes, who had issued a monition to the Prize Agent to bring in the proceeds that were in his hands from the capture of the ship *Hoogskarpel*, which was taken by a squadron of the King's ships under the command of Commodore Johnstone, having a detachment of the King's troops aboard commanded by General Meadows, on the expedition against the Cape of Good Hope, in the year 1781.

Secret instructions were given by his Majesty to the Commanders in Chief, that all the booty which should be gained by the joint operation of the army and navy, at the attack of that settlement, should be divided in two shares,

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between the land and sea forces. The attack was not made; but the squadron, while the troops were on board, took the said ship and cargo belonging to the enemy, in an open unfortified bay, at a distance from the destined object of attack. This ship and cargo being condemned as lawful prize, the produce of it was to be distributed according to the provisions of the Prize Act, 21 Geo. III. cap. 15, and the subsequent proclamation. It was contended that under that Act, a legal right was vested in the officers and crews of the squadron to their shares, on the condemnation as lawful prize. Therefore, where the Court of Lords Commissioners of Appeals from the Admiralty, had issued a monition to the Prize Agent, to bring in the proceeds which were in his hands, a prohibition was granted to that Court, because the monition was contrary to the legal vested right of the officers and crews of the squadron.

LORD LOUGHBOROUGH.—In this case the declaration states, first as a proposition of law, that the exposition of the statute laws of this realm, appertains to the King's Courts of Record. It then recites the Prize-Act, which passed upon the war against the States General, and his Majesty's proclamation for a distribution of prizes, under the authority given by that Act. It then states the appointment of Commodore Johnstone, as commander of a squadron, of the plaintiff as captain of a ship in that squadron, and of General Meadows as commander in chief of the land forces, to be employed on an expedition against the Cape of Good Hope, a colony of the States-General in Africa, and secret instructions given by his Majesty, directed to the two commanding officers, Commodore Johnstone and General Meadows, in order to prevent disputes which might arise between the fleet and army. By these instructions it was provided, that such booty as should be taken from the enemy by the joint-operation of the fleet and army, at the attack of the Cape, should be distributed among the land and sea-forces into two shares; the share of the navy to be divided according to the regulations established for the service. The declaration then states, that the squadron, with the land-forces on board, proceeded upon the said expedition, but did not make any attack upon the Cape of Good Hope.

It then states, that upon the 21st of July, the squadron, with the ship of which the plaintiff was captain, having the land-forces on board, did, in a certain open unfortified bay, called Saldahna Bay, at a great distance from the Cape of Good Hope, attack and seize, as prize, the ship *Hoogstraet*, and cargo, the property of the subjects of the States-General.

The declaration then states a libel in the High Court of Admiralty, by his Majesty's Proctor, for the condemnation of the said ship as lawful prize, being taken by Commodore Johnstone and his Squadron, and a sentence thereupon upon the 4th of September, 1782, condemning the ship and cargo as good and lawful prize generally, reserving the question who were captors; and afterwards, upon the matter reserved, on the 28th of May, 1785, an interlocutory order of the Court of Admiralty, pronouncing for the interest of the army generally, agreeably to the spirit of his Majesty's instructions, and decreeing the distribution of the prize according to such instructions, in equal shares. The declaration then proceeds to state an appeal from this last decree upon the 30th of June 1786, and a decree of the Court of Appeals, reversing the last-mentioned decree of the Judge of the High Court of Admiralty, and pronouncing the ship and cargo to have been taken by the conjoint operation of his Majesty's ships employed on an expedition against the Cape of Good Hope, under the command of Commodore Johnstone, and of the army under the command of General Meadows upon the same expedition, and condemning the ship, with the unclaimed cargo, as good and lawful prize to the King. The declaration then states, that Edward Taylor and John Pasley were duly appointed agents by the officers and crews of the several ships companies of the Squadron, and as such agents, soon after the decree of the 4th of September, 1782, caused the ship and her cargo to be sold, received the produce, distributed part thereof among the officers and crews of the Squadron, and that the residue remained in the hands of Pasley, and ought to be distributed to the captors aforesaid, pursuant to the statute and proclamation. It then states, that the plaintiff Home brought his action in the Court of King's Bench, of trespass on the case on promises, against Pasley the surviving agent (Taylor being stated to be dead), for damages for the non-payment of his share. It then states as a proposition of law, that the Commissioners of Appeals in Prize Causes, have no authority by law to take out of the hands of any agent so appointed, the money arising from any sale of prizes, finally adjudged lawful prize to his Majesty in a Court of Admiralty. That the Commissioners of Appeals, contriving to take out of the hands of Pasley the money, and to prevent the plaintiff recovering at law his damages, did, on the 3d of May, 1788, issue a monition to Pasley to bring in an account of sales, together with the proceeds. This is the whole of the declaration. The defendant traverses the last allegation of pro-

cess issued against the prohibition, and demurs generally to the rest of the declaration. This general demurrer consequently admits all such facts stated in the declaration, as are well pleaded.

Upon the last argument, three objections were taken to the statement of the declaration, to shew that upon the face of the declaration, the plaintiff has not made out a case which entitles him to a prohibition. I shall mention these objections very briefly, because to each of them, as it seems to me, a very short and distinct answer occurs. The first I shall take notice of, was that by the plaintiff's own shewing, he and all the Squadron have forfeited their share in the distribution of the prize, because part of it was distributed before final sentence of condemnation. It is of no moment to discuss whether there was any such cause of forfeiture, because the objection mistakes the state of the declaration: which indeed states that part had been distributed, but also expressly states that it was after the sentence upon the 4th of September, against which sentence there is no appeal, and which was an adjudication, condemning the ship and cargo as lawful prize. The second objection is, that the appointment of Taylor and Pasley, as agents for the officers and crews of the Squadron, is not well set forth, from an expression in the statute, which says that the officers and crews, and others having interest in the prize, shall appoint agents, and then marks out the manner in which they are to be appointed. The subsequent part of that clause of the Act, sufficiently shews that no other persons but the officers and crews of the Squadron can have any concurrence in the appointment of agents. There may be four agents; one appointed by the flag-officer, another by the captains, another by the lieutenants and other officers of that rank, and another by the private men and those who are, in the fifth class according to the Proclamation, to share the amount of the prize. There is no other description of persons, who can under the Act concur in the appointment of agents. But that is rather going further than is necessary for an answer to the objection; for this is not a case where the agents are parties appearing as plaintiffs, setting out a title; but the plaintiff Home, who is to make out his own title distinctly, states as a fact, that agents were duly appointed. This is undoubtedly sufficient upon a general demurrer. If there is any objection to the appointment of agents, and if that objection would be sufficient to turn round the plaintiff in this case, it ought to have been set forth more particularly. Upon a general demurrer, the allegation that the agents were

were duly appointed, is certainly sufficient. Another objection was, that the authority of the agents was determined by the death of Taylor. Now though this too is of no moment upon a general demurrer, it is also not true; because this is not a mere authority given to Taylor and Pasley; they have an interest in the proceeds of the prize, and it is certain that where persons are appointed with an interest vested in them, the interest survives. The surviving agent, Pasley, being possessed as agent, he must continue to be accountable to those who have appointed him in the character of agent. It was totally immaterial whether Taylor had remained; all the interest that was in Taylor, is now in Pasley; all that Pasley possesses, and all that Taylor together with him possessed, Pasley is chargeable with. He received it in the character of agent, and is answerable for it in that character. All these objections were overlooked in the former arguments; and for the reasons I have given, the Court are of opinion that they are of no weight.

Upon the three first, and the latter part of the last argument, the case has been very fairly debated on its real merits. The Court has given all the scope to the question which the importance of it required; first on the motion for a prohibition, then upon three arguments on the demurrer; and we are all unanimously of the opinion which I shall close with delivering. The prohibition was prayed upon a ground which has never been disputed, that it belongs to the Courts of Common Law to controul the proceedings of all other Courts, if they transgress the limits assigned to them: and the argument for the demurrer has fully admitted the proposition upon which the declaration is built, to be good in law, namely, that the exposition of the statute law of the land appertains to the King's Courts of Record, and ought to be discussed and determined in those Courts. The general grounds upon which the Courts of Westminster Hall proceed in matters of prohibition, were so fully discussed in a late case *, and when the Court in that case disposed of the motion, that I avoid entering into them, and assume it to be a clear ground for over-ruling the demurrer in this case, if it shall appear upon the face of the declaration, that the plaintiff has a legal right, founded on an Act of Parliament, and that the Commissioners of Prize are proceeding to deprive him of that right, or to obstruct

* *Vide Brymen v. Atkins*, ante, 164.

him

him in the prosecution of it. On the other hand, if the plaintiff has either no such right, or the Commissioners of Appeals are not proceeding to act in opposition to it, the demurrer must be allowed. It was admitted on both sides and is certainly true, that the general question of prize does not belong to the Courts of Common Law. By general question of prize, I mean a question, whether a ship or goods taken at sea be lawful prize or not. It was admitted also, that when there is an adjudication of prize by the Court of Admiralty, the rights which an Act of Parliament gives respecting that prize, are the subject of actions at law, and are cognizable in the Courts of Common Law.

The argument in support of the demurrer maintains these propositions. First, that this appears to be a case in which the King's ships were not the sole captors; 2dly, that the Act of Parliament vests a right to the prize in the King's ships, only in the case where they are the sole captors; 3dly, that the Court of Prize has a general authority in all cases to distribute the shares of the prize, and therefore that the proposition with which the declaration concludes, namely, that the Commissioners of Prize have not by law authority to take out of the hands of the agent, the money arising from the sale of prizes, is not a true proposition; but that, on the contrary, the Commissioners have a right to order those possessed of the produce, to bring it into that Court. The first proposition then to be maintained, on the part of those who support the demurrer, is a proposition of fact; namely, that this appears to be a case in which the King's ships are not the sole captors. This is founded upon the terms of the two sentences, which are set forth in the declaration, together with the facts stated, that the fleet and army were destined upon a joint service, and were both concurring in the capture. From reading the declaration attentively, it certainly does not appear that the *army, as such*, gave any aid to the capture. When I say the *army, as such*, gave no aid to the capture, I mean to exclude the case of the *army being stationed on board the fleet*, at the time of the capture. For though they are distributed amongst the ships, yet they are not acting there *as an army*, but are only part of the force that is on board each respective ship. In that situation, the soldiers and officers are concurring in the capture, but no otherwise concurring than as any passengers on board might be. When I speak of the *army as such* concurring in the capture, I am to be understood to mean a concurrence, in which the land-forces acting under the *command of their proper officers*, are carrying on some operation

or other, that may be conducive to the object, in which the fleet, acting as a fleet, is concerned. It cannot be therefore taken from the facts stated in the declaration, that *the army, as such*, was in any respect operating towards the capture of the ship in question. The statement of the declaration is, that the squadron of which the plaintiff's ship was one, with the army *on board*, took the prize. If therefore it was necessary for the defendant to avail himself of this fact, it would have been proper for him to have stated by a plea, the manner in which the army acted, and what was the co-operation of the army towards the reduction of this ship stated to be taken upon the High Seas. But upon a demurrer, we must take the fact as it stands upon the face of the declaration. I will now proceed to see whether the sentences will aid the demurrer in the assumption of the fact, that the King's ships were not the sole captors. The first sentence of the High Court of Admiralty holds the army according to the spirit of the instructions, to be intitled to a share in the capture. But certainly in that sentence there is no conclusion whatever to be drawn, that the army was, in fact, *as an army*, active in the capture, or in any respect operating towards it. According to the spirit of the instructions, giving the utmost latitude to that expression, the Judge might suppose the strength of the fleet increased by the accession of the army, and therefore, taking the case itself to be within the instructions, that the army was intitled to a share. The other sentence states, that the capture was made by the conjoint operation of the ships and troops. Now both these sentences are perfectly consistent with the allegation of facts stated in the declaration, that the troops were on board the fleet. Being on board the fleet, it cannot be said that they had no share at all, were of no weight, or of no moment in the reduction of this particular ship. Therefore, literally taken, it might be true, that the capture was the effect of the general efforts of all that were on board, whether in the character of seamen, or soldiers. But this by no means furnishes a state of facts to shew any accession of the army, *as an army*, to the reduction of the ship in question. Upon those grounds therefore I shall feel myself bound upon the demurrer to hold that the plaintiff has shewn a title of sole captor, in the squadron of which his ship was a part, and that he will, of consequence, be intitled to a prohibition, if in the sequel of the declaration he has shewn any act done by the Court of Prize contrary to his right.

In considering the second proposition, which is, that the Act of Parliament vests a right to the prize only in the case where

where the King's ships are the sole captors, I will go a little out of the record, and take for granted, as a matter of supposition, what I think ought to have been introduced in a plea upon the record, if the defendant wished to avail himself of it. I will take the supposition, that the army had landed, and given assistance from the shore, in any mode in which such assistance to a capture afloat could be given. Upon that supposition, the question will be, whether the consequence drawn from it is true, and can be maintained? The first sentence holds the army as such to be intitled to a share; which may be, though the right was vested in the King's ships; for there might be others concurring in the capture, who would be intitled either upon the ground of assistance, or upon some grounds, which it is not necessary for me to state, to have a concurrent interest with them in the produce of their share. But it by no means follows, that the fleet, because of another body concurring in assistance, shall have no vested right. The second sentence has been argued, and I believe it has been argued very justly and fairly according to the intent of it, to proceed upon this supposition, namely, that the case of a co-operation of another force besides that of the King's ships, takes the case entirely out of the Prize Act. That proposition undoubtedly is not stated in terms upon the face of the sentence. But it has been argued to be the ground of the sentence; and I take it that it was the ground. I take it according to the argument, which was insisted upon in support of that sentence, that when the sentence proceeds to say, that it shall be condemned as lawful prize to the King, it does not mean merely to pronounce that it is lawful prize, (for that is the form of the adjudication where the right is unquestionably in the captors, where there is no controversy, nor any dispute made upon it), but that it means that the right is vested in the king by his prerogative, and that it is at his majesty's disposal. Now the Prize Act says, in distinct terms, that the officers, &c. of the King's ships, shall have the *sole interest and property*, in all ships and cargoes, &c. which they shall take, being first adjudged lawful prize. These are the terms of the statute. Antecedent to any statute upon the subject, there is no doubt but that by the law of the realm the property of prizes taken by the King's ships was in the King. The effect of the Prize Act is a parliamentary gift by the King, of that interest which his Majesty would have had in prizes, to the officers and crews of the several ships of the fleet, and to the owners of the privateers which shall have been fitted out under the directions of the Act. The ex-
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pressions of the Act are distinct and plain, and the operation of it is, to transfer to those who are to take, all the interest which antecedent to the Act was in the King. It respects only prizes taken at sea; the expression is that they shall have the *sole interest and property*; but certainly that mode of expression does not exclude the case of a joint capture; which joint capture may either be by a King's ship and a foreign allied force (in a case where this country is carrying on war in conjunction with some other state of Europe), by a King's ship and a private ship of war, or by a King's ship and a non-commissioned ship. In every one of which cases, the property of what the King's ships take, has uniformly and repeatedly been adjudged to the officers and crews of his Majesty's ships. They are *solely intitled* to what they take not to what they *solely take*; that is not the expression of the Act. So far as they are the captors, no other power has any right to interfere with them. Where there are others (whether an allied force, a private ship of war, or a non-commissioned ship), also captors, they have a right, in some cases, as for a *quantum meruit* for assistance given; in others they have been holden to have a distinct and specific share in the capture. But that in no case destroys the right which the King's ships *solely have, quod that capture which they have made*. They have a *vested property* in what they take. The second section of the Act goes on and says, in like manner, ships taken by privateers shall wholly and entirely belong to the owners, to be distributed according to the contract they have entered into. That cannot be holden to exclude the privateer, by any fair construction of the words, in cases of joint capture. Suppose this case to happen: a King's ship and a privateer are jointly and equally concerned, and equal in point of force, in the reduction and capture of an enemy's ship, would it be a reasonable construction of the Act to say to the King's ship "the prize is not your sole property;" to the privateer, "it cannot wholly and entirely belong to you; it was taken by you both conjointly, therefore it shall belong to neither of you." The proposition seems to me to be morally impossible. The interest of the King's ship, which would in that case be in a moiety of the prize, would be an interest to them *solely*: the interest of the privateer in the other moiety of which they would be the captors, would wholly belong to them, to be distributed according to the contract they might have entered into with their owners. These cases are perfectly clear, and have been determined in instances so numerous, that it is quite unnecessary to enter into a detail of them; they have been referred to in the
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course of the argument. This is the case of a joint expedition by sea and land forces, and of an operation, whereby the enemy's ships are reduced; the ships being always supposed to be taken on the high seas. It varies the case, where the object has been the reduction of a part of the enemy's territory. The consequence of that reduction may be the acquisition of property afloat, of ships of war taken in a harbour, of ships coming into a harbour after the place has been reduced. In all these cases, perhaps it would be difficult to say that the capture was made by the King's ships. If a garrison town with an inclosed harbour had been reduced, and the ships had fallen with the place, and as a consequence of the taking of the place, or of the reduction of the country; these could not be deemed to be captures made by the King's ships. As such cases might possibly happen, where expeditions have been undertaken at sea in foreign parts, by the naval and military forces of this country acting conjointly, instructions have been given for the distribution of such booty as might be taken, which is the phrase commonly used. But I do not apprehend that ever the instructions have been directly pointed, that the instructions referred to in this declaration are so pointed, or that they could by possibility be pointed, to give to any part of his Majesty's subjects, acting under his Majesty's directions, prizes taken upon the High Seas by the King's ships. A parliamentary grant cannot be controuled by the effect of any grant under the King's sign manual. The king has not the property to grant, he has parted with it all. Whatever is the proper matter of marine prize, whatever ships are taken afloat, and not as booty in consequence of the reduction of the country, are the subject of the Act of Parliament. The Act of Parliament attaching upon it, the right of the King's ships is to the intirety. In point of fact, we very well know, that where such expeditions have been undertaken, agreements have been entered into by the different persons intitled under the King's Proclamation, and the different divisions of the army, and they have put the whole together in order to avoid disputes.

In the case of the Pondicherry prizes, several actions were tried upon them before me. Those agreements had been made between the superior officers, between the captains of the navy and the officers of the same rank in the army, but had been refused to be made between the third class in the distribution, the Lieutenants of the Navy, and the Captains of the Army; the Lieutenants of the Navy had refused to concur in it. Though in the other classes the land forces

were

were admitted to share, they were not admitted to share in *that class*, with respect to the prizes taken at sea; and a recovery was had against the agent on that ground. But I am arguing this case much further than there is occasion to go; for admit, for the purpose of the argument, that a co-operation might take effect so far, as to give a right to the army to share, does it follow from the army being intitled to share, that the co-operation of the army should destroy and annul totally the right of the navy? That conclusion is a great deal beyond the premises. The interest in a prize taken at sea (of which I am always speaking) may by possibility (I do not say that it cannot) be shared or distributed, but it cannot be taken away. The interest which is vested, after the adjudication of lawful prize, in consequence of a parliamentary grant, cannot be annulled or destroyed. If upon any merits, or upon any ground upon which assistance may give a right to share it, a share may be imparted, to others, that share can be ascertained and supported. Yet the very supposition that it is a share, admits that it must be a share of something which is vested in somebody. The proposition contained in the sentence supposes that the right which the navy would have had by law to every thing that is taken afloat, is by the intervention of another power co-operating with the navy taken away and destroyed: which appears to me to be a proposition directly contradictory to the Act, and not founded at all, in consequence of the parliamentary gift in favour of the officers and crews of his Majesty's ships. If it could be supported, it would undoubtedly reverse all the cases, where a co-operation by a non-commissioned ship, or a privateer, or a foreign allied force intervenes. But in none of these cases could it be said, the King's ship was not solely entitled. The proposition must be either general, that the King's ships can take a vested right in no case where assistance is given them, or that they must in all cases, where they are captors, have a vested right, subject to such claim for assistance, as any other party can make against them. I have in this part of the argument, as I said before, gone out of the record: it is now fit I should return to it.

When I say, that upon the facts stated in this declaration, and admitted by the demurrer, it does not appear that there was such assistance given by any other force, as to make it a joint operation, but that the king's ships had reduced this prize, and taken it; it must be remembered that the subject of the capture has been adjudged to be lawful prize, taken by the ships having the king's forces on board; in which respect

respect the king's forces are intitled to come in for a participation under the Act and Proclamation. But that does not prevent a right from vesting, but, on the contrary, establishes that the right is vested, for it is under the Proclamation founded upon the Act of Parliament, that the troops are intitled to such share as upon the face of this declaration belongs to them. I now come to the terms of the sentence, and I own that for some length of time, they raised considerable doubt in my mind, what would be the result of this question, and what would be proper for this court to do in disposing of this demurrer. It is possible to understand the sentence consistently with the right of the navy. For the premises assumed by the sentence do not appear to form a conclusion, that the navy are not intitled. It is not inconsistent with the supposition that the navy is intitled; and I might understand the sentence, where they adjudge it prize to his Majesty (in the common way in which sentences are pronounced), not to be inconsistent with that right, if the Court had gone on to pronounce afterwards, that it should be distributed according to the terms of the Proclamation, though it had contained this recital, that the prize was effected by the conjoint operation of the land forces, as well as by the officers and crews of his Majesty's ships. But then after the sentence passed, the declaration states that a monition issued upon it. Considering the terms of that monition, I am perfectly clear in opinion that it gives a different construction and a different effect to the sentence. The monition is not against the agent merely to account for what he has received, and to bring in their accounts of sales and disbursements: but it goes on, and directs the agent to bring into the Court of Appeals, the proceeds of the cargo remaining in his hands. It was argued for the plaintiff, that the terms of the monition were large enough to extend to the effect of overhauling the partial distribution already made, and to oblige the agent to bring in all that had been in his hands. I do not think it could have that construction. I take it to be directed simply to bring in the residue, what is in his hands; but also that it directs the agent to bring into the Court of Prize the proceeds of the prize in his hands. Now such a monition is a very usual step taken either by the Court of Admiralty, or by the Court of Appeal in Prize Causes, where the subject of the suit, the ship or goods, are not deemed legal prize, and where, of course, they are not vested in the captors, in order to make restitution. The agent who has got the proceeds in his hands, may be directed to bring in those proceeds, that they

they may be restored to those to whom they belong. But I do not find that any instance could be quoted, where a notification had issued against the agents to bring in the proceeds of the prize, in a case where it had been *adjudged lawful prize*, and of course where, upon that adjudication, it was to be distributed either to a privateer, or according to the terms of his Majesty's Proclamation, to the officers and crews of the different ships entitled. And I think it cannot be; for the Act has made very special provisions with respect to the payment of shares after adjudication; upon which adjudication a legal right is vested. The agents are to be nominated by different classes of people entitled, as I have stated. Every step of the duty of the agents is under the directions of the Act. They alone are to make the sales and appraisements. All the produce of the prize is to be put into their hands. They are then to give public notification of the times of payment, so many days before actual payment is made. They are directed, after such notification, to make payment according to the prize lists, and in the proportions in which the parties are intitled. They are directed to give an account from time to time, of all their proceedings. They are directed to furnish Greenwich Hospital, in which, by law in certain cases, an interest in every prize vested in captors is also vested, with accounts in order to ascertain that interest. They are throughout the whole course of the Act, supposed to be subject to actions, at the instance of those who are entitled to share in the prize. It is a legal vested right, and the method of obtaining the effect of that right, is by action against the agents. In particular cases, they are furnished by the statute with a defence to the action. As in the case, where men bring an action against the agent, for a share having been marked *Run*, it is by the statute a sufficient defence to the agent, and he is intitled to a verdict in his favour, if the plaintiff does not ground himself upon a certificate that the *R* has been taken off. If he fails in any part of the duty imposed upon him by the Act, a penalty to be recovered in the Courts of Westminster Hall meets him at every step. The intention of the Act is obvious, and perfectly squares with the rules of law, that the prize being adjudged by the Court of Admiralty, distribution of the interest in that prize is to be managed as the distribution of any other legal vested right is according to the laws of the land, namely, by action in the courts of law. I do not care to lay it down, for I am not able to say that I am perfectly sure that I see the whole extent of all possible cases that may occur, I do not care to

lay it down, that there is no possible case in which the agent of a prize may not be ordered by the Court of Admiralty, or Court of Prize, to bring in the actual proceeds of the prize. Yet I profess, I have not been able to figure to myself what that case can be. Suppose a case in which it is suspected that the agents are insolvent, or likely to become insolvent, and that for the safety of those interested, it was desirable to take the money out of the agent's hands, and lodge it in some safe custody; that appears to me, speaking conjecturally, to be a possible matter to be done by the Court of Prize; for I should doubt whether in such a case, an application could be made to the Court of Chancery to secure the money. The Court of Prize could not indeed make the distribution themselves, nor do I find that any such application has been made to them.

Could there then be a suit against the agents for distribution? A suit for distribution might be well maintained in the Court of Admiralty; or if the case were got into the Court of Appeals, in that Court. But what would be the decree to be made upon that? It would be a personal decree upon the agent; the distribution would be directed, the shares allotted, and then upon that decree, the agents might be proceeded against personally. It would be a contempt of Court if they did not make payment according to the order. Yet there would be a much better way, a more effectual one, by an action immediately grounded upon the right vested and the *quantum* of that right ascertained by the order of distribution. But the Court itself cannot, as I conceive, take into their own hands to direct the proceeds of the prize to be paid over to their registrar, for the purpose of distributing it. The registrar is liable to none of the provisions of the Act to which the agent is liable. The agent is liable to an action. But I am at a loss to conceive, if the agent is directed to pay over all the money, how the action for money had and received could be maintained in effect against him, that money having been taken out of his hands. I am still more at a loss to conceive, how it could be maintained against the registrar. What sort of an officer is the registrar? Is he to make distribution? No. Is he to make notification? No. The Act directs that to be made by the agent. Is he subject to any penalty? No; he is not the person to whom the Act is directed, to whom the duty is enjoined, and who is answerable for the breach of that duty, in an action to be brought. Would the agent be protected in an action for the penalty? It would be hard that the agent should be liable to it; but I do not see, upon the face of the law, how he could

could be furnished with a defence for the non-performance of the duty enjoined by the Act. But none of these remedies can take place against the registrar. Therefore it seems the clear direction of the Act, that the money is to remain in the hands of the agent, liable to the actions of those who have a legal vested right in it; that to those persons the agent is accountable; that against the primary interest of those persons, the money is not to be taken out of the hands of the agent by order of the Court of Prize. The construction which has been put upon the second sentence is, that there was no vested right in this prize in the officers and crews of his Majesty's ships, nor in the army; but that upon the ground stated in the sentence, the whole was vested in his Majesty by his prerogative; and was to be disposed of to such uses as his Majesty should think fit. With that construction of the sentence, the monition which has issued is perfectly consistent; but not with the idea, which we take to be a well-founded idea, that by force of the Act, after the adjudication of lawful prize, the plaintiff and all other officers, and the crews of his Majesty's Squadron, have a vested legal right. The effect of the monition is directly in prejudice of the right of action of all other persons concerned; it interferes with the legal duty imposed upon the agent; and subverts and overturns the law with respect to the duty and situation of agents, where they are acting for persons having a vested right in prizes. It is not necessary to have recourse to those cases cited of *Lord Anson* and the others, because the proceeding in this case prevents the plaintiff from recovering his legal vested right, at least it disturbs him in the recovery of that right, if not totally prevents him, and subjects the agent, and all others who are interested in the acts of the agent (Greenwich Hospital included), to the Courts of Prize. Whereas, according to the construction which we are of opinion ought to be given to the Prize-Act, all those rights are to be enforced in Westminster Hall, belong to the Courts of Westminster Hall, and do not belong to the Courts of Prize. These are the grounds which I have gone through, without referring to the cases that have been cited by name. Those cases are very well known, are in the memory of every one, and will all be found in the recollection of the argument. The ground upon which we proceed is, that upon the face of this declaration the plaintiff has a *legal vested right* in the subject of the monition; that the Court of Prize cannot deprive him of that right, cannot do an act prejudicial to that right, and

and cannot prevent or obstruct him in the recovery of that right. The demurrer therefore must be over-ruled, and

Judgment given for the plaintiff in prohibition.

The following General Rules were made in this Term, in the Court of Common Pleas.

Ordered, That from and after this Term, no *bail-bond* taken in London or Middlesex, by virtue of any process issuing out of this Court, returnable on the first return of any Term, shall be put in suit until *after the fifth day in full Term*; and that no bail-bond taken in any other city or county, by virtue of such process, shall be put in suit until *after the ninth day in full Term*; and that no bail-bond taken in London or Middlesex, by virtue of any process issuing out of this Court, returnable on the second or any other subsequent return of the Term, shall be put in suit until *after the end of four days*, exclusive of the day on which such process shall be expressed to be returnable; and that no bail-bond taken in any other city or county, by virtue of such last-mentioned process, shall be put in suit until *after the end of eight days*, exclusive of the day on which such last-mentioned process shall be expressed to be returnable, upon pain of having all proceedings made upon such bail-bonds to the contrary thereof set aside with costs; any former rule or order of this Court to the contrary thereof in any wise notwithstanding.

Ordered, That from and after the first day of Michaelmas Term next, every fine at the time of the signing of the Judge's *allocatur* thereon, shall have the *writ of covenant sued out and annexed thereto*. And it is also ordered, That from and after the first day of Michaelmas Term next, in every common recovery wherein the vouchee or vouchees shall per-

sonally appear at the Bar of this Court, for the purpose of suffering such recovery, the writ of entry shall be sued out and produced at the time of the recording of the vouchee or vouchee's appearance at Bar, at the foot of the precipe in such recovery. And it is further ordered, that from and after the first day of Michaelmas Term next, on every common recovery wherein the vouchee or vouchees' Warrant or Warrants of Attorney shall be taken under a *dedimus potestatem*, the *allocatur* of the Lord Chief Justice, or some one other of the Justices of this Court, shall be indorsed in *dedimus potestatem*, by virtue of the several rules and orders of this Court, in that behalf made; and that at the time of indorsing such *allocatur* on every such common recovery taken by *dedimus potestatem*, the Writ of Entry shall be annexed thereto, together with the affidavit or affidavits of the caption or captions of such Warrant or Warrants of Attorney respectively.

LOUGHBOROUGH H. GOULD.
J. HEATH. J. WILSON.

C A S E S

In the HIGH COURT OF CHANCERY, before the
RT. HON. LORD THURLOW,

MICHAELMAS TERM, 30 GEO. III.

SMITH *ex parte* in the Case of LEWIS and POTTER.

This Case came before the Court upon a petition which stated that Sir James Esdaile and Co. had proved a debt under the bankruptcy of *Lewis and Potter* upon a note of hand of J. Barber, payable to one Powel, and indorsed by him to Lewis and Potter, who afterwards endorsed it to Esdaile and Co. After so proving the amount under Lewis and Potter's commission, Esdaile proceeded against Barber and Powell to judgment, and then accepted an offer made by Barber to pay 15s. in the pound as a composition to all his

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creditors.

creditors, and gave him a full discharge for this note, without notice to Lewis and Potter's Assignees. The petition prayed that the proof of this debt under the bankruptcy, might be expunged, upon the ground that Esdaile had discharged the acceptor by composition, without notice to the Assignees.

LORD CHANCELLOR.—I have before decided that the doctrine of notice, which holds amongst solvent persons, does not apply as between bankrupt estates: but, here, the endorser only was bankrupt, the maker and the payer of the note were not. The debt, proved by Sir James Esdaile, was undoubtedly well proved at the time, and the question is, Whether the subsequent conduct of the creditor has destroyed that interest which he acquired by such proof. By the composition which he has made with the drawer of the note, which goes to the length of discharging of the drawer, he certainly has prevented the assignee of the indorser from coming on the drawer of the note for payment of what his estate shall pay in consequence of the proof; and yet, on the other hand, it does seem a strong thing to say that where there are many names on a bill, one of whom is insolvent, though not bankrupt, and the other bankrupt, and the holder proves under all the Commissions, and then makes a composition, *bonâ fide*, with the insolvent person, and obtains from him all that he possibly can, that he shall, thereby, be deprived of the benefit of all the provision made by him under the commissions against the other parties who stood on the bill posterior to the party compounded with. And I am well satisfied, in this case, Sir James Esdaile did, in fact, make the best terms he could with the drawer of the note by taking 15s. in the pound of him in full. And whatever difficulty I may find in making a precedent which allowed of such a composition, without giving notice to the assignees of the indorser, I am convinced that the justice of this particular case, if it stood alone, would not require me to expunge this debt. The case made, does not impute any fraud to the transaction of this composition; but, on the contrary, the holders used all their diligence at law against the drawer of the note and the payer, and then made the best terms they could with the acceptor; though, at the same time, they have gone to the extent of acquitting him altogether in respect of the note. However, whatever may be the circumstances of the present case, I think, in point of precedent, it may be dangerous to say, that after such an acquittal, the holder may resort to the indorser's estate. It is certainly open to this sort of fraud, that when the holder

holder sees that, in one way or other, he is sure of his 20s. in the pound, he may favour an acceptor, at the expence of an indorser, by compounding with the acceptor for just so much as he conceives will be the deficiency under the endorser's commission. In this view it may be a dangerous precedent; and I cure this danger by saying, generally, that the holder of paper shall not compound with the prior names on the bill, but with the consent of the assignees of the posterior party. And it is not an answer to say, that if any fraud is practised in the composition, that shall take it out of the general rule. It is much better, and more convenient in practice, to have a precise rule to go by: and justice will, in general be better done to all parties. It is not that notice is strictly necessary; but I go upon this, the debt is well proved against the indorser's estate; this gives his assignees a right of action against the acceptor, or drawer, for the amount paid out of the indorser's estate: but this right is cut away by the composition and discharge given to the acceptor by the holder. Therefore it is better to say, let the assignees either take the whole, or permit the holder to make the most of it he can against the acceptor. I think therefore the debt must be expunged.

Afterwards his Lordship told the Court he had conversed on this subject with some of the Judges, and was satisfied that the holder must get the consent of the assignees of the endorser before he can discharge the acceptor, else the endorser's estate is discharged at the same time.

EARL OF LONSDALE, and Others, against CHURCH.

C A S E.

By 7 *Anne*, the trustees for repairing the harbour of Whitehaven; for the time being, or eleven or more of them, were authorised to appoint a collector of the duties for repairing the harbour; and the sums received by him were to be paid over to a receiver appointed by the trustees; and they were to be allowed for their office not exceeding 12d. in the pound.

Church was appointed clerk and receiver, at a salary of *£ol. per ann.* and was afterwards appointed treasurer also.

After holding these offices 5 years, the trustees removed him from the said appointment, he having a large balance in his hands; at the time of Church's appointment, his predecessor had a balance of £1622. 16s. 3 $\frac{1}{2}$ d. in his hands, which was, by the direction of the trustees, paid to the plaintiff Dixon (one of them) as a banker, into whose hands the defendant Church was directed to pay the surplus monies in his hands from time to time, and, in consequence of his appointment, the defendant Church, with the defendant Benn, as his surety, entered into a bond, in the penalty of 1000*l.* for the due receipt of the duties, to make regular payments to the tradesmen, of the harbour, and to give a fair account of his receipts and disbursement, and pay the balance thereof to the trustees, or as they should appoint.

The defendant, by his answer, admitted that, during the execution of the said appointments, he placed out several sums of money, being part of the balances in his hands, from time to time, on securities at interest, which interest was received and disposed of by him for his own use; and said he conceived he had a right so to do, not having been called upon by the trustees to pay the same.

THE MASTER OF THE ROLLS now gave judgment as follow:

The question is, Whether the receiver is not liable to account for the interest made of the money in his hands?

The first objection taken, is, that the plaintiffs have no right to call upon him; but it does not appear who could have a right, if the present plaintiffs have not. No such objection is raised by his answer, in which he admits the right, and submits (in case the Court shall think proper) to pay interest for the balances in his hands. I am therefore of opinion, that he is estopped by his answer, from this objection; and it seems to me that the plaintiffs are persons who have a right to call upon him for the recount.

Then the question is, Whether, from the nature of the office, he is not accountable for interest? The present may be thought a hard case; but the only question is, whether, in a Court of Equity, he may not be called upon?

This is not a case, like that of *Lord Salisbury v. Wilkins*, of a person dealing with his own servant, who clearly would not have a right to call upon him; for if a gentleman will permit his steward to make use of the money in his hands, he certainly shall not call upon him for the intermediate interest. So if these persons had been dealing with the clerk on the subject of their own money, and settled accounts with

with him, they would be bound by those settlements. But that is not the case here: his trust was for the public, to exact duties from all persons coming into the harbour; for which receipt he was to be paid at the rate of 1s. in the pound. Then it is said, that the trustees, though concerned for the public, may permit him to make interest till he is called upon to account for it; but the mischief to result from this would be very great: it might put it out of the power of the person who has such monies in his hands, to answer the public exigencies, and might give him public money, in such a way that the public could not have the use of it. This cannot be shewn more strongly than by the present case; for, when called upon to account and pay his balance, the receiver could not answer that call, because the money was out at interest. Then he objects that he was never called upon till the time of his discharge:—the question has nothing to do with the notice, but whether he had a right to use the money, and make interest of public property. The legislature, when they gave him 1s. in the pound (or possibly two, if he united both offices, as it seems doubtful whether the trustees might not allow 1s. as collector, and 1s. as receiver), could not mean that he should make interest. I think, therefore, in order to the example, he ought to account for the interest. Not being accountable for interest, would be a temptation to receivers not to be ready to pay money due from them when demanded.

It is a settled rule of the Court, that such a receiver shall pay in his balance every year; and, if he keeps the money in his hands, he is answerable for interest. He is bound by his bond to have the money ready when called upon. If, therefore, he has made interest, he has done it contrary to the intent of the Legislature, and the duty he owes to the public; and, therefore, he must answer for the interest he made, notwithstanding the trustees may have been negligent in not calling for it sooner; for, as his trust was to have the money ready when called upon, he must make it good for so much as he received above his salary.

Ex parte SMITH, in the Matter of LEWIS and POTTER.

Petition to stay the dividend until Lovel, a creditor of Lewis and Potter, bankrupts, obtained goods to the amount of £.270 from the bankrupts, two days before they failed, and on suspicion that they were about so to do. The question was, Whether he could detain them as part of payment of his debt?

LORD CHANCELLOR; Lovel cannot avail himself of this advantage, and take a dividend for the residue, if the fact should turn out as stated, I will therefore direct an issue to try the fact. Lovel's assignees stand in the same situation with Lovel.

FETTIPLACE against GORGES.

The Hon. Juliana Page bequeathed certain legacies to her niece, Sophia Charlotte Fettiplace, the plaintiff's wife, in the words following: "I leave, in trust to Lord Howe, for the sole and separate use of my niece Charlotte Fettiplace £.1000 stock, and £.1000 3 per cent. reduced Bank annuities were set apart to answer the legacy to plaintiff's said wife, in the name of Lord Howe as trustee for her.

Sophia Charlotte Fettiplace the wife, afterwards died, leaving her husband surviving her, but having first made a will, leaving her *personal estate* to her niece, Diana Frances Gorges the defendant, who obtained administration, with the will annexed.

The plaintiff insisted that his late wife had no power to make such will, he never having assented to the same, or to her having such separate property.

LORD CHANCELLOR.—The case of *Peacock v. Mink* (2 Vez. 190), supposes that there may be such an agreement as will bind the heir; although where the wife makes a voluntary disposition, against the heir it cannot be carried into execution: but with respect to personal property, her disposition is good. If the wife makes no disposition, the husband takes it as next of kin, not from his marital right.

All the cases shew that the personal property, where it can be enjoyed separately, must be so with all its incidents, and the *ius disponendi* is one of them.

Bill dismissed.

JOLLIFFE *against* EAST.

Jane Jolliffe, deceased, left to her brother William Jolliffe's two eldest daughters, Eleanor and Sophia Jolliffe, the sum of £.10,000, to be equally divided between them when they should arrive at the age of twenty-one years, and that sum to carry interest for them, from the time of her the said testatrix's death, until they should arrive at the above age.

Sophia Jolliffe, one of the legatees, died, without having attained her age of 21 years, intestate, and her father took out administration to her, and the plaintiff, apprehending that each of the legatees had a vested interest in a moiety of the said legacy, and that the administrator to Sophia was intitled to her moiety, paid the sum of £.5000 to him, with interest from the death of the testatrix.

It was contended that the whole £.10,000 belonged to Eleanor upon the death of her sister; and the question was, Whether the legatees were joint tenants, or tenants in common?

LORD CHANCELLOR.—I believe it is very well understood that the Court decrees a tenancy in common as much as it can. If, indeed, there are no words that will point at a tenancy in common, the rule of survivorship must take place. But I think it pretty clear that the words in this will, are sufficient to create a tenancy in common. As to the costs of the suit, wherever a testator has expressed himself so ambiguously as to make it necessary to come into this Court, his general assets must bear the costs.

CROSS v. HUDSON.

John Hay, upon his marriage with Catherine Wild, entered into articles by which the said Catherine conveyed certain premises to the use of John Hay for life, remainder to the use of said Catherine for life, remainder to the use of all the children of the marriage, in such shares as John Hay and

COURT OF CHANCERY,

Catherine Wild should appoint; in default of appointment, to all the children of the marriage equally in tail; remainder, to the use of the survivor of the said John Hay and Catherine Wild, and the heirs and assigns of such survivor; with a proviso, that it should and might be lawful for the said John Hay, by any deed or writing, or by his last will and testament to grant, limit, and appoint, unto any person or persons, either for his, her, or their life or lives, or for any greater estate, any rents, or annual sums, not exceeding, in the whole, the yearly rent, or annual sum, of £.100, tax-free, and without any deduction, to be issuing out of, and chargeable upon, the said messuages, lands, tenements, or any of them, and to be paid at such days and times, and with such powers and remedies for recovering such rents, or annual sums, when in arrear, as to the said John Hay should seem meet; so that such rents or annual sums, to be so granted, limited, or appointed, should not take place during his life.

John Hay, in the life-time of Catherine, there being no issue, made his will, whereby in pursuance and execution of the power to him reserved, and by virtue of all other powers and authorities vested in him, he granted, limited, and appointed, from, and immediately after his decease, unto the defendant Thomas Fulling, his heirs and assigns for ever, one rent or annual sum of £.100 free from deductions, to be issuing out of, and chargeable upon, the said premises.

After thus executing the power by will, Catherine Hay died in the life-time of the said John Hay, without issue; so that the remainder in fee became vested in him.

It was contended against the disposition in the will, that the annuity was not a subsisting charge upon the estate contained in the settlement; inasmuch as John Hay, before his death, became entitled to an estate in fee-simple in the estate comprised in the settlement; and becoming so seised, the power given to him by the settlement become merged in the fee-simple.

LORD CHANCELLOR.—If any serious doubt remained in any party, in this case, I would take time to look more particularly into the cases; but it seems to me that the disposition made by the testator, in this case, must take effect of his interest; though the power is gone.

I think, with the defendants, that the power is merged but I am also of opinion that, though the power was merged and the will made by him purported to be an execution of the power, yet, as he evidently meant that the charge should take place on the estate, at all events, it must be sustained.

a charge on the estate out of the interest he had at his death. This case is not at all like *Tomlinson v. Dighton*, (1 *Williams*, 149), there the question was, whether a conveyance, as by the owner of the estate, should operate as an execution of the power which the wife clearly had, but no ownership; and it was held it should. Here the will refers to the power, and though it goes on with some words more general, as to "all powers and authorities enabling me thereto" yet, to be sure, technically speaking, the power does not apply to the sort of interest which ownership gives. But the testator, in this case, has charged the estate with a burthen which his interest enabled him to lay on the estate; though his power, properly speaking, was gone. When I speak of his power, I mean at the time of his death, for that is the period at which the will speaks. And, therefore, it is the case of a man having no power, but having an interest enabling him to charge the estate, and charging it in the shape of an execution of a power notwithstanding: now I never heard it as a point to be maintained, that because a man shews an intention to execute a power which he has not, the interest which he had in the estate should not bear out the disposition he thinks proper to make of a charge on that estate. Therefore though the power in this case were merged, which I take it to have been, yet the devise must take effect out of his interest.

C A S E S

In the HIGH COURT OF CHANCERY, before the
RT. HON. LORD THURLOW,

HILARY TERM, 30 GEO. III.

POOLE v. RUDD.

Upon an application to set aside a purchase, it appeared that the purchaser had paid earnest-money at the auction which was ordered to be laid out in the funds.—The question

tion was, Whether the benefit arising from a subsequent rise of stock, was to remain with the seller of the estate, or go to the purchaser who had made the deposit.

Mr. Justice Buller, who sat for the Chancellor, when the case came on, now gave judgment as follows:

MR. JUSTICE BULLER.—I have taken time to consider this question, it being a matter of great importance, and I was not sufficiently informed as to the rule that had been laid down: the first thing to be considered is, Whether the Court has laid down any rule: if it has, it ought to be abided by; for I am a great enemy to making nice distinctions between cases before the Court, and those already determined:—the case of *D'Oyley v. the Countess of Powis*, has been referred to, but the report is so short, I cannot tell whether that case was precisely the same as the present. It only appears, that the money was laid out by Lord Beauchamp, and it seems to be laid out upon his application. The general rule laid down is, that it was considered as being in payment, and if so, it is indifferent which side applied that it should be laid out. It appears that was not a new case, for Sir *Thomas Sewel* has made several such orders, and the money paid in was always considered as in part-payment. This obviates the doubt as to the vendor, who must always take the stock as he can find it. Another circumstance in this case makes it clearer, the money was paid into the hands of the auctioneer, who paid it to the agent of the vendor; therefore the general rule has prevailed, that, let the money be laid out as it will, it is a payment for so much of the purchase-money. And, if laid out without opposition from the seller, it must be presumed to be with his assent. If laid out under the authority of the Court, it will be binding on both.

ANDREWS *against* PARTINGTON.

Considerable legacies were left to children when they attained the age of 21.

The trustees provided certain sums for their maintenance, without any report that the father was unable to do it.

The question in this case was, Whether the trustees should be reimbursed out of the effects?

LORD CHANCELLOR.—Although where there has been a bigotted father who would not educate the child in the Protestant religion, the allowance has been made to the trustees.

it is contrary to all rules, that the interest, vested in the children, should be applied to their maintenance in the lifetime of the parent. This would amount to a gift to the parent of so much as should be necessary for the maintenance, and the father being one of the trustees, can make no difference. Therefore let the reference be only as to the ability of the parent, and what will be necessary for the future maintenance of the children.

HOCKLEY and Wife v. MAWBEY.

The main questions before the Court in this case were, Whether, by the words printed in Italics in the following will, Richard Russel, the son, held an estate for life only? And, Whether, by the word *present* estates, all the estates of which the testator was possessed, or the enumerated estates only were meant? I give and bequeath unto my wife, Rebecca Russel, all those my freehold messuages in Johnson's Court, near Fleet-Street, N^o 2, 4, 5, 6, which were purchased in the name of my son, but are my property, as appears by a declaration of trust from him to me made; and also all those six messuages or tenements, being freehold, situated in Raven and Sun Yard in Bermondsey aforesaid, and the reversion of seven more there, which will descend to me in about twenty years: which last-mentioned estate was likewise purchased in the name of my son, but are also my property, as appears by another declaration of trust from him to me made; to hold unto my said wife, all and singular the said premises for and during the term of her natural life: also, I give and bequeath unto my said wife all my leasehold estates for and during her natural life; and from and immediately after her decease, I give, devise, and bequeath the same, and every part thereof unto my son *Richard Russel*, and to *his issue, lawfully begotten*, or to be begotten, *to be divided amongst them as he thinks fit; and if my said son shall happen to die without issue lawfully begotten*, my will is, that as well my *present* freehold and leasehold estate, as the estates hereby directed to be purchased, shall be sold, and the money arising therefrom shall be equally divided between my brother *Thomas Russel's children*, my *sister Willet's children*, and my *sister Parker's children*. And my will and desire is, and I hereby order and direct, neither the estate directed to be
put-

purchased, nor any of my *present* freehold or leasehold estates may be sold or disposed of during the life of my wife or her son; and all the rest, residue, and remainder of my estate and effects whatsoever and wheresoever, after payment of my just debts, funeral expences, and the above legacies, I give, devise, and bequeath the same, and every part and parcel thereof unto my said wife, to and for her own use and benefit for ever.

LORD CHANCELLOR.—The principal question is, What estate the son took in the enumerated estates? and I think the testator intended, and has expressed his intention of giving a contingency with a double aspect, in one event, a gift to the children of the son, if he should have any, and if he should not have any child, that then the estate should be sold for the purposes in the will. He did not mean the estate to go as an estate tail, but that the children should take distributively; in which case, they must take as purchasers; and the consequence is, that Richard took only an estate for life. He had a power to divide: but if he did not so, there was an interest in the children that would entitle them to an equal division. It is observed, that if he had no children, it would go to grand-children; it would so, but only as descriptive of his power: in order to take, they must be alive at the death of Richard; it is not sufficient to say that they are the immediate descendants of Richard to make them take under the estate tail. It is sufficient that the division must take place at the death of Richard, which is within the rules. Therefore two events were provided for: 1st, There being children of Richard; in which case they would take: 2dly, There being no children; in which case, the estates vested in the persons described. 2d. Then as to what estates passed.—The word *present* may be taken in opposition to the estates *to be purchased*; or it may mean all he could devise: but here it receives a different construction from the other contents of the will. The word is not of force sufficient to control the former gifts, and receives a construction from the residuary clause which it could not be meant to defeat. It cannot extend further than the enumerated estates.

Decreed therefore, that, according to the true sense and meaning of the will, the estates to be sold under the devise are the freehold estates there enumerated, and all the leasehold estates; and that the other freehold estates not enumerated in the will, passed thereby to Rebecca Russel; and it is ordered that the estates, devised to be sold, should be sold accordingly, and the money to be paid into the Bank.

And

And it is declared, that the money, so to be paid, will be divisible, according to testator's will, in equal shares among his brother Thomas Ruffel's children, his sister Willet's children, and his sister Parker's children living at the time of the death of the testator: and the Master was to inquire, what children they had living at the death of testator, and which of them are dead, and whether they left any, and what personal representatives.

VAUGHAN v. BURSLEM.

T. Vernon, of Hanbury Hall in Worcestershire, Esq. left the said house and his estates to his daughter Emma Cecil for life, remainder to her children in succession in tail, remainder to the plaintiff Elizabeth Vaughan, with remainder over, and directed further that all his plate, household goods, furniture, glasses, and china, which should be in his house at Hanbury-Hall, should go as *heir-looms with his real estate, and be held and enjoyed* by the person or persons that shall, for the time being, by virtue of his will, be entitled to his said real estate, *as far as the rules of law and equity will permit*, and directed an inventory of the plate to go with the estate.

Mr. Cecil had a son born by his said wife, who died in a few weeks, whereupon the father took out administration to him and afterwards upon separating from his wife, removed the plate from Hanbury Hall.

The plaintiffs prayed an injunction to restrain the sale of the plate, and that it might be returned to Hanbury Hall for the benefit of the persons interested in the estate.

LORD CHANCELLOR.—I am called upon to say that the effect of this will is to prevent the use from springing, where, if it sprang, it would give an absolute estate. To do this, I must determine that the use shall not spring or vest till 22 years after the death of Emma, the first taker for life. How am I to gather this? From the words “as far as the rules of law and equity will permit?” This cannot be; the uses could not go further than the law will permit. But these words have their sense; for he seems to have known that the personal property could not go so far as the real. The case of *Gower v Grosvenor* has the same words: and it seems as if the reporter took the language of Lord Hardwicke; but there is a considerable chasm, and with what modifications that was filled up I cannot say; but I think it is not necessary

to follow all that is there said. Here, the estates are given to Emma for life, remainder to the first and other sons; with remainder over, and the furniture, &c. is to go to the person entitled to the estate as far as the law will permit.—The person entitled seems an express description of the child of Cecil. The other cases have had different words. In *Foley v. Burnell*, it was contended the word *possession* was in opposition to *reversion*; the use there did not spring; for want of the contingency arising on which it was to spring. It would be pedantic to say, that *Gower v. Grosvenor* turns on the words “as far as the law allows;” for they are explained by the different natures of real and personal estates. To do what is called for in this case, I must go much further than ever has been done; for I know no instance where the conveyance has been carried to the utmost extent of what the law might do. I know conveyancers have endeavoured to frame a case to the utmost extent it can be carried: but here it might be suspended to 22 years after a life in being. He certainly meant the son, if he was in possession, should have them. What then, shall they not be in possession in the mean time, not vest in any body? Cases which say you shall do all this for the testator, by saying you shall do all that can be done, will not do. This would be fetching the intent of the testator, in a way many cases have said it cannot be done. The property cannot be rendered inalienable but by preventing the use from springing; which cannot be when a person is born who would take absolutely. It would be a direction to keep it unalienable as long as could possibly be. I am of opinion that the words are not sufficient to give such a construction, and that, consequently, I must declare that this property vested in the son of Emma, and goes to the father as his representative.

BROWNE v. SOUTHOUSE.

Mary Wyvil, next of kin to Elizabeth Wyvil, who died intestate, being insane, William Wyvil administered during her insanity, and employed the defendant, who was an attorney, to collect large sums of money due to the estate of Elizabeth, which he directed him to lay out in the funds, and which he, the defendant, informed him he had done, but which, in fact, he kept in his own hands.

Mary

Mary died intestate and insane, near 20 years after Elizabeth. The plaintiff obtained letters of administration as next of kin, and William Wyvil being dead, now filed a bill of account against Southouse for an account, and paying interest for the time he had the money, which amounted to £. 800.

LORD CHANCELLOR.—It is a clearly-established point, that the defendant has received money, but that would not have bound him, if he had not been under a duty to make interest of it, for the benefit of the estate; because then it would only be holding the money as a banker holds it; but here was an employment, accepted by the defendant Southouse, to lay out the money from time to time. It is said, he is not liable, because an administrator is not bound to invest the monies in his hands, so as to make interest: but here he has bound himself. Therefore an account must be taken of the times when he received monies belonging to the estate, and when he ought to have laid them out: and he must answer interest at 4 *per cent.* from the times when he ought to have laid them out.

CAREY v. GOODING.

The testator left his brother and nephew, who were both indebted to him in large sums, £.500 each, appointed them executors, and named no residuary legatee. The plaintiff was next of kin, and prayed payment of the debts the executors owed the testator.

It was argued that their appointment as executors extinguished the debt.

LORD CHANCELLOR.—It is a settled point in this Court, that the appointment of the debtor executor, is no more than parting with the action. This is a trust for the next of kin.

The EARL OF ABINGDON *v.* BUTLER *and* PENSON.

The defendant Butler held a lease upon three lives under the plaintiff in the manor of Cumner. The other defendant was steward of the manor. Butler being minded to put his sons' lives into the lease, applied to the steward for that purpose. This estate was valued in the steward's book at upwards of £.100 a year, and the rule of the manor was to assess 7 years purchase upon the lapse of two lives. Two of the lives named in the old lease were deceased: but the plaintiff was lead to think that only one life was lapsed, and accordingly was induced to execute a new lease for the lives of the defendant's three sons, upon payment of £.200 as for one life lapsed, and one exchanged.

The plaintiff prayed that Butler should pay the further sum of £.616, upon the ground that the lease was fraudulently obtained, and in default that the steward should pay the same.

The LORD CHANCELLOR said this was a palpable fraud, and decreed that an account should be taken of the value of the lease at the time of its execution; that the defendant Butler should pay that value with the costs of the suit: and that, in default of his payment, the deficiency should be made good by Penson, the other defendant, who should pay his own costs.

CROWE *v.* BALLARD.

By the will of the Earl of Litchfield, the plaintiff, Robert Crowe, Esq. was entitled to a legacy of £.1000 after the death of Lady Litchfield, aged 69 years. The plaintiff was about 22 years of age, and being pressed for money, the defendant undertook to sell the legacy for him to the best advantage; and told him he had sold it for £.300, which was the most he could get, to a Mr. Toft; but it turned out, in fact, that Toft was only a nominal, and that the defendant was the real, purchaser.

Two years after, Lady Litchfield died; and the plaintiff, to hide this transaction from his father, applied to Ballard, who

who said he had bought Toft's interest in the legacy, and proposed to relinquish it upon receiving a joint *post obit* bond from the plaintiff and his brother for the payment of £.1800 upon the death of their father, who was then 63 years of age. In this bond there was a condition underwritten, reciting that the plaintiffs stood indebted to defendant in £.900, conditioned for payment of £.1800, in case either of them should survive the father: but, in fact, no such debt of £.900 subsisted. After the father's death, which happened in two years, the plaintiff Robert came into possession of £.3000 a year; the defendant applied for payment of the bond, but the plaintiffs being unable to pay it, a money-bond was given for the £.1800, and interest at 5 *per cent.* and he paid 4 years interest on the bond; the defendant afterwards arrested the plaintiff, and he filed this bill, praying that, upon payment of the money really advanced, the defendant might deliver up the bond to be cancelled.

LORD CHANCELLOR.—This case lies in a narrow compass. The plaintiff was a young man entitled to a legacy of £.1000 upon the death of Lady Litchfield, who was 69 years of age. Ballard undertakes to sell the legacy, and pretends he took great pains so to do; but it is in evidence that he represented it as a very hazardous business. Then he buys it himself. This is alone sufficient to set aside the transaction. It is impossible, at any rate, that the person employed to sell can be permitted to buy. Even if this was done with the knowledge of the party selling, it could not be supported. That principle must prevail, even if he had bought fairly. He paid the money, as advanced by the person who had purchased. The whole, according to his own answer, was £.310: of this £.49 is denied. It is as oppressive a transaction as can be conceived. Then, the consideration of the *post-obit* bond:—then, as to the subsequent bond being a confirmation, I am at a loss upon what principle courts have spoken of confirmations. If a gentleman of rank, fortune, and honour, under age, in distress, or otherwise, gives a bond; and afterwards conceives that he has made a hard bargain, and, knowing that the bond is bad, will give a new bond, that will maintain the possession of the right of the holder of the bond, and the act shall be said to be a confirmation; but not any act done under the influence of the former transaction, and the opinion that that bond is good. Here the bond was not given freely, but under the influence of the former transaction. I do not remember the case cited (*Norris v. Rudd*), but it

must have proceeded on the same ground with this. The confirmation from payment of interest is of no avail, being still under the same impression. I am clearly of opinion the transaction must be set aside, and the bond delivered up: the Master must take an account of what is due between the parties, and the defendant must pay costs.

Ex parte MORRIS.

In this bankruptcy the effects produced more than 20*s.* in the pound, and the Lord Chancellor ordered the creditors to have interest for their debts, but directed first that the bankrupt should be paid his allowance.

COOPER v. THORNTON.

The defendant and Winstanley, since deceased, were executors of Bonnel Thornton; by the will he left 100*l.* to Thomas Cooper, *to be equally divided between himself and his family.* Winstanley paid this legacy to Thomas Cooper. Nine years after Cooper's death, his children, thinking this payment to the father not a good payment, demanded the money of the surviving executrix.

THE MASTER OF THE ROLLS.—It has been argued against this demand that upon the common rule of presumption with respect to bonds, that it must be presumed, from the length of time, that the legacy has been paid; but I shall take no notice of this presumption, because it being in proof that it was paid to the father, the case does not admit a presumption that it has been again satisfied. All the cases where that presumption has been admitted, have contained circumstances from which the presumption might arise; which not being the case here, there can be no such presumption. The only question then is, Whether the payment to the father is a sufficient bar to the demand made by the plaintiffs? It is argued, on the part of the plaintiffs, that the payment to the father, of legacies given to his children who are not of age, is a bad payment. In early times, it appears, from the case of *Holmery v. Collins*,

in the 26th and 27th *Car.* II. 1 *Eq. Abr.* 300, that the payment to the father of a legacy to the child, was held good; but since the case of *Dagley v. Tolferry*, 1 *Wms.* 285. 1 *Eq. Abr.* 300, the idea of the Court has been that it is not a good payment; and that even in the case of an adult child, it is not good, unless done by the consent of the child, or made so by a subsequent ratification. In that case, the rule was laid down, and was laid down very harshly, as the testator, on his death-bed, had given directions that the legacy should be paid to the father, and there had been mutual accounts between the father and the child, and an acquiescence for near fifteen years. It appears, from the registrar's book, that evidence was read that the legacy was ordered, by the testator, to be paid to the father; but that circumstance can make no difference, as I doubt much whether such evidence ought to be read. It would be a dangerous thing to admit evidence, that a legacy given to one person was ordered to be paid to another. From the registrar's book, of the year 1714, folio 414, it appears that the defendant was decreed to pay the plaintiff his legacy, with costs, but no interest; and, from the book *A.* of the year 1715, folio 40, that an appeal being brought before Lord Cowper, the decree was affirmed; but, as it was thought an hard case, the deposit was divided. I lay the matter out of the case that it was directed to be paid to the father; and although it was so directed, and the money paid, and although the son acquiesced a great length of time, it should be still competent to him, or his representatives, to demand it; because a contrary determination would encourage such payments, and because the son must acquiesce, or pursue his father; or, which is the same thing, by bringing his suit against the executor, occasion his pursuing the father; and that I take to be the ground on which Sir John Trevor and Lord Cowper went: and if the legatee did not stand in that relation to the person to whom the legacy was paid, the bill would be dismissed. The only other case is *Phillips v. Paget*, 2 *Atk.* 80. It went off upon a compromise; so that we have no account of it but from Mr. Atkyns's book. There the executor was misled by the testator's directions, to pay the legacies within a given time; which circumstance ought to have weight in the judgment. Then let us consider the circumstances of the present case, for I do not mean to interfere with the doctrine of *Dagley v. Tolferry*, that a payment to the father is bad. The present is a stronger case for the executors than that of *Phillips v. Paget*. Here, after

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other legacies, all with the words, I give to, &c. is owing, "to Thomas Cowper, to be divided between him and his family." It is contended that, notwithstanding the case of *Dagley v. Tolferry*, here *Thomas Cowper's* was to be hand to receive. I should do the harshest thing imaginable, to make the executor pay it over again. It is true the testator has not inserted the words by him to be divided. he had, there could not have been a doubt: but if he want the executors to divide, why did he mention *Thomas Cowper*? What did he mean by the word *himself*? That can only be applicable if *Thomas Cowper* is to divide. Then it is not to him and his children, but to his family, which is much more extensive. It is to be paid to him, and he, as a trustee, is to divide it. If any of the children had called upon him to have it secured, it must have been so. Therefore, if in *Philips v. Paget*, the executor was discharged, *multo magis*, he must be so here. Then it was paid by *Winstanley* in a manner that was wrong; for I must allow it to be wrong, if it was not meant to be paid to *Thomas Cowper*. *Cowper* died in 1775; from that time, the plaintiffs might have called upon the executor, without his being able to pursue the father. In 1777, the youngest came of age: why did they not then file their bill against *Winstanley*, who did not die till after this bill was filed? For six years they took no step. If they had brought their bill, they might have recovered against *Winstanley*. But, under the circumstances of the case, I believe it was well paid, and that it was intended that he should receive it. If one was to give a legacy to the senior Six Clerk, I think it should be paid to the senior Six Clerks, I think it should enquire who the other Six Clerks were. And that if it been the case of a bequest of goods to A. to be divided between himself and family, A. with the assent of the executor, might bring trover for the goods.

Bill dismissed

COUNTESS OF SHREWSBURY v. EARL OF
SHREWSBURY.

In the marriage settlement of George Talbot, being tenant in tail of the estates of the Duke of Shrewsbury, by marriage settlement in 1718, inserted a clause to raise by a trust-term, £.20,000 for daughters. In 1719, the late Earl was born. By Act of Parliament, 1720, the marriage-settlement was confirmed, and the estate was settled as the earldom should descend: and it was enacted that the said George, or John Talbot should not alien the premises, and that every fine or alienation should be void; but that neither any son of the said George Talbot, or of John Talbot, or the heirs male, who should, within 6 months after they should attain the age of 18 years, take the oaths of supremacy and allegiance, and should from thenceforth continue a Protestant until they should attain the age of 21 years, should be disabled from alienating the same: and the said Act also contained a proviso, by which the said George Talbot was impowered, in case he should have issue a son, and also a younger child or children, by deed or will, to create a trust-term of 99 years, for raising £.15,000 for the portions of daughters, and £.200 *per ann.* for each younger son. In June, 1720, George Talbot, by deed, vested accordingly a term of 99 years in trustees, for raising these annuities, and, by will, reciting that he had a son and daughter born, and might have more (without taking notice of the deed), devised to other trustees, for a term of 99 years, to raise the portions and annuities. In the deed, they were to be raised by rents, profits, or by sale or mortgage; by the will, by rents and profits only. George Talbot died in 1733, leaving several sons and three daughters, of whom George, the late Earl, became seized of all the real estates, as first remainder-man in tail under the settlement of 1718, and the Act of Parliament confirming it; but subject to the restriction in the Act as to alienation, unless he should conform within six months after attaining 18 years of age, which he did not. The eldest daughter, Barbara, married the late Lord Aston, and, before marriage, executed a release of her portion of £.5000 on its being paid, by the late Earl, to the then Lord Aston, the father of her husband, and discharged the estate as well as released the Earl and the trustees from the same, but the Earl took no assignment of the charge.

He

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in part, paid the portion of his sister Mary, who married to the late Lord Dormer; which portions he paid of his own money.

Indenture of demise of 2d July 1751, reciting the Act of Parliament, and that the Earl had paid the portion of Lady Aston, and part of the portion of Lady Dormer; and that none of the said £.15,000 having been raised the term of 99 years, the said Earl was entitled to such part of the same as he had advanced, paid, and raised; and that Matthew Robinson (a party thereto) had raised with the Earl, at the sum of £1000, for the purchase of a term of 40 years in the advowson of the parish of Bughfield, part of the premises comprised in the years term; and that the executors of the surviving trustee had been applied to join in demising the said advowson, which they had consented to, on condition that the said £1000 should go in part satisfaction of the £.15,000 to be raised by the said term: the Earl and trustees conveyed the right of patronage to the said Matthew Robinson for 40 years.

The Earl, after this deed, out of his own money, paid the remainder of Lady Dormer's portion, and also the portion of Lucy his youngest sister; but took no assignment of their respective claims. The late Earl made his will, dated 12th of June, 1747 (previous to several of these transactions), whereby, after ordering that such of his debts for which no real security was given, should be paid out of his personal estate, and that those for which any real security was given, should be paid out of the real estates charged thereon, with, in ease and exoneration of his personal estate; and after giving legacies and annuities, he gave all the rest, and residue of his real and personal estate whatsoever and wheresoever to his brother Charles Talbot, his heirs, executors, administrators, and assigns, and appointed him executor thereof. Charles Talbot died in the late Earl's life-time. George, late Earl of Shrewsbury, died 21st of July, 1787, without issue, and without revoking his said will, leaving the defendant Charles Talbot, now Earl of Shrewsbury, (son of the said Charles Talbot), his nephew and heir at law, and plaintiff his widow him surviving. The plaintiff, 6th of September, 1787, took out letters of administration, with the will annexed, to the late Earl, and possessed herself of his personal estate, and filed her present bill, praying that the portions paid by the late Earl her husband, out of his personal estate might be raised out of the 99 years term, for that purpose provided; and that all proper parties might join in raising the same; and that the same, when raised, might be

be paid to the plaintiff as widow and personal representative of the late Earl.

LORD CHANCELLOR.—I am clear that the takers of the estates (notwithstanding the clause) were tenants in tail; and, also, that where a term is out-standing in law, to raise a sum of money, and another person will pay that sum, *eo nomine*, that the person so paying has a right to stand in the place of the creditor.

If it is paid by the holder of the fee, the Court considers it as the debtor paying the debt, and therefore will not keep the term out-standing; but it will be a term to attend the inheritance, and he may make any use he pleases of it as such: but, as between his real and personal representative, it will, in the hands of the heir, be a payment of the debt by the debtor.

But the Court has gone further; for in the case of tenant in tail, where there are remainders beyond to other persons, it is not so distinctly the debtor's paying the money; but the Court has treated it in the same manner, because he is competent to make the estate a fee: therefore he is said to represent the fee. In that view, the Court considers the payment by the tenant in tail, the same as if it was paid by the tenant in fee; and the term shall attend the inheritance: but if the tenant in tail gives a demonstration that he intended the term to be burdened with the debt, it shall remain charged; but it requires proof, on his part, to shew that the term is out-standing.

Where a tenant for life pays a debt charged on the inheritance which he cannot make his own, he stands in the place of the creditor: but, from considering the circumstances in which the estates are limited, a presumption may be raised, that though he paid off a charge upon an estate which he had for life only, circumstances may be laid before the Court, to shew that he meant to discharge the estate. Therefore, from the situation of the estate, it shall be presumed, that he meant to pay the debt, or not.

Taking this as the rule; the Act of Parliament has settled these estates in inheritance unbarrable. Every taker takes, under it, an estate of inheritance; but the Act contains a prohibition of alienation. With respect to interest, it might be a question, Whether it would not be contrary to the faith under which he holds it, for any taker to suffer a charge to remain on the estate?

The rule laid down applies to the estate at bar as strongly as to any estate for life.

The

The person for whom the charge is to be raised, has no remedy for the interest against the estate; but if the personal estate of the tenant in tail was sufficient, the Court would make it pay: because it was a fraud not to keep it down. A tenant in tail, holding under the restrictions in the Act, could not alienate by enlarging the estate. The estate of the tenant in tail (as of tenant for life) must, therefore, keep down the charge.

Then, as he could by no means make the estate his own, it makes it equal to him as if it was an estate for life. By paying the charge, he pays a debt upon a fund which he cannot make his own.

Then the question is, Whether there are circumstances, in this case, to shew that he meant the estate to be discharged?

I still lay it down to belong to those who would exonerate the estate to shew that it was to be exonerated.

Then, in 1742, he pays off £.5,000, the fortune of the sister married into the family of Aiton, and takes a release from her to shew, that she did not take the money *aliunde*. It is a discharge, against her, to Lord Shrewsbury and the trustees.

But it is discharged by the payment of Lord Shrewsbury. Nobody has contended it would be impossible for Lord Shrewsbury to claim it.

Accordingly, in 1751, another transaction takes place, which would otherwise have been a fraud upon the estate. It was understood, by the parties to that transaction, that the sum paid by Lord Shrewsbury was a sum in which the estate was indebted to Lord Shrewsbury.—Then, Lord Shrewsbury, as tenant for life, meant to sell the advowson for 40 years (if his three sons should so long live) to secure a presentation, and, that it might not be determinable on the death of Lord Shrewsbury, it was done out of the term of 99 years in trustees, which did not depend on the life of Lord Shrewsbury. The trustees insisted that the money paid should be so upon the recital that the whole was due to Lord Shrewsbury. This is a proof that he did not consider the estate as exonerated. There is no kind of presumption, arising from this transaction, that he meant to pay the charge to the parties; it was considered he might do what he pleased with the money. Then it is said, that the length of time which has elapsed shews that he meant to discharge the estate; and it is assimilated to a waiver of right.—Where a man out of possession acquiesces, and the acquiescence

escence is accompanied with circumstances not otherwise to be accounted for, but by presuming such an intention it must be presumed; but here the intention only was that money, which would bear 5 *per cent.* interest, should be paid off. It seems to be the case of money paid by a person not liable to pay it, in discharge of the estate; unless there is proof that he meant to discharge it. For nine years it appears, he did not mean to discharge it; and, since that time, it stood doubtful what his intentions were.—The money must, therefore be raised as prayed by the bill.

This cause was re-heard, at Lincoln's-Inn-Hall, the 19th of July, 1790; when Mr. *Solicitor General* and Mr. *Mitford* were heard for the plaintiff; Mr. *Mansfield*, Mr. *Lloyd*, and Mr. *Graham*, for the defendant: but nothing material was added to the former argument: and, Lord *Chancellor* continuing of the same opinion, both on the general principle and the particular circumstances of the case,

The decree was affirmed.

WEST v. PRIMATE OF IRELAND.

Sir Septimus Robinson directed his executor “to bequeath 1000 guineas to Lord Cantelope, for the use of his seventh, or youngest child, in case he should not have a seventh child living.”

When Sir Septimus died, Lord Cantelope had six children living, *there having been another who was dead.* The plaintiff was the next born after Sir Septimus's death, and was baptized *Septimus*. Several more children were born afterwards.

The question was, Whether the youngest of these last born, or Septimus, the plaintiff, were entitled to the legacy?

LORD CHANCELLOR.—The plaintiff being, in fact, the *eight* child born, cannot take by the description of seventh child. The legacy belongs to Lady Catharine as *youngest* child.

PITT v. LORD CAMELFORD.

Pinkney Wilkinson, by a codicil to his will, reciting, that he was possessed of about £.7000 Navy Bills, gave the same to his executors, to receive the interest, and to lay the same out in the funds, to such uses as his daughter, Ann Pitt should appoint. At the time of making the codicil, he had £.7029 Navy Bills; he afterwards purchased other Navy Bills, and also Victualling Bills, and sold others. At the time of his decease, he was possessed of only £.4,300 Navy Bills, but also various Victualling Bills.

The question was, Whether the Victualling Bills were included in the legacy, it being proved that in the Stock Exchange the Brokers considered Victualling and Navy Bills as synonymous?

LORD CHANCELLOR said, if ever there was a specific legacy, this was so: if they had continued, and other legacies had exhausted the personal estate, these could not have abated.

The funds purchased with the *Navy Bills* of which testator was possessed at his decease, must pass.

TAWNEY, *Knt.* v. CROWTHER and Another.

Defendant was seised of an inn at Benson, which the plaintiff employed an Attorney at Oxford to treat for the purchase of, who agreed to give, and Crowther to take, £.1100: and it was agreed between them, that the agreement should be reduced into writing, which happened not to be done; but the defendant declared, that his word was as good as his bond, and that he should be in Oxford on the Tuesday following, and would then sign the agreement: but not coming, he wrote a letter, in which he stated his having been from home, and acknowledged that he said his word should be as good as a bond, and that there was time enough sufficient from thence till Michaelmas to settle every thing; and again repeated once more, that his word should always be as good as any security he could give.

The question was, Whether this case was within the statute of frauds?

LORD CHANCELLOR.—The letter is sufficient to prevent the operation of the statute.

LOWTHIAN v. HASEL.

This was a question, Whether a creditor by mortgage, who, also, was a bond-creditor for £.1834 3s. should tack his bond-debt to his mortgage, against other specialty-creditors?

LORD CHANCELLOR.—The only reason why the mortgagee can tack his bond to his mortgage, is to prevent a circuitry of suits: it is solely matter of arrangement, for that purpose; for, in natural justice, the right has no foundation. The principle explains the rule; and, therefore, it can go no further: the creditor having, another specific security, cannot give him in justice any priority. There being no foundation in justice, the only question is, Whether the Court is in the practice of doing it? And it has not done it in any case but that of the heir, and merely to prevent circuitry.

MOLESWORTH *against* MOLESWORTH.

The Honourable Coote Molesworth, by his will, made in 1782, gave to Richard Molesworth and Nathaniel Nicholls, their heirs, &c. all his lands, &c. real and personal, upon trust, to raise and pay such sums of money as they, from time to time, should think proper, for the comfortable support and maintenance of his wife, during her life, directed his trustees to apply £.3000 to and for the sole and separate use of his grand niece Henrietta Maria Molesworth, subject nevertheless to the controul and discretion of his trustees thereby invested in them, (that is to say, that if the said Henrietta Maria Molesworth should hereafter, in any flagrant instances, misbehave herself, or should marry against, or without, the advice and consent of his

his said trustees, or the survivor of them, then he did authorise and empower his said trustees to withhold or deduct from the said sum of £.3000 as his said trustees should, in their judgment think proper, according to the nature and degree of said misbehaviour; and he did, thereby, direct that his said trustees should receive, employ, and apply to the best seeming advantage, all such sum or sums of money as should be so withheld and deducted for the sole use, benefit, and behoof of his said wife, with full liberty to dispose of the same, either during her life or by will. He then gave, after the decease of his wife, several pecuniary legacies (24 in number, other than that one legacy of £.100 was given, "to the now four children of Archibald and Mary Grant, to be equally divided, share and share alike, wishing that each of them may have the liberty of managing his and her respective share, as he or she may chuse.") The testator then provided that, "if his estate and effects, after the decease of his said wife, and after payment of the said legacy, or sum of £.3000, should fall short of paying the legacies before given, that the said several legacies (except the said Henrietta Maria Moleworth's) should abate in proportion to the several legacies given to them respectively;" and proceeded thus "of the legatees mentioned, 24 in number, it is at least possible that one or more may die before he, she, or they, become intitled to his, her, or their legacy or legacies, and, in that case, his will was, that the sum or sums so given should revert and return to the sole use, benefit, and behoof of his said wife."

Henrietta Maria Moleworth survived the testator, but died in 1784, aged 23 years, unmarried and intestate; the testator's widow died in 1785; whereupon the plaintiff, as administrator of his late daughter, H. M. Moleworth, applied to the defendants for payment of £.3000.

The question was, Whether the legacy was vested, or whether it was so affected by any thing as to make it not payable, on account of the death of the legatee in the life-time of the wife?

LORD CHANCELLOR.—I think these are four separate legacies of aliquot parts of the £.100, to each child; and that the testator has only misreckoned the number of his legatees, and meant Miss Moleworth's legacy to be no more vested during the life of the wife than the others, although indeed, if had it not been for the superadded words, it would, by the prior gift, have been a vested legacy; as it is, the legacy lapsed by her death in the life-time of the wife.

READ v. DEVAYNES.

Testator appointed certain persons executors, and gave them legacies; which one of them who had not proved the will, or acted as executor, claimed.

The MASTER OF THE ROLLS said, he was not entitled to his legacy, without acting or at least proving the will.

C A S E S

In the COURT OF KING'S BENCH,
TRINITY TERM, 30 GEO. III.

DOE on the Demise of MUSSEL against MORGAN.

George Mussell, seized in fee of the premises in question, on 13th December, 1727, by will devised them to his wife Elizabeth for life, remainder to his son Ebenezer Mussell for the term of 99 years, if he should so long live, and from and after the several deceases of his wife and son to the heirs of the body of Ebenezer: but his will was, that it should not descend entirely unto Ebenezer's eldest son, but that he might, by deed or will, devise the same to and for the benefit of all his children that should be living at his decease; and if he should make no such limitation or appointment, then that the same should be equally divided among all and every the son and sons as tenants in common, and the several heirs of the body and bodies of such son and sons, with benefit of survivorship among the sons, and

if there should be but one son, to that son only; in default of such issue, to the daughters with like limitations: with divers remainders over. George Mussel died 6th June, 1733. The widow entered and died October, 1741. Ebenezer entered, and in 1752, having then only one daughter, by lease and release conveyed the premises, in contemplation of a marriage between Morgan and the said daughter, to the use of the husband for life, remainder to the wife for life, remainder to the issue of that marriage. Ebenezer afterwards married, and had issue the lessor of the plaintiff, and died in 1764. The defendant is the surviving issue of the marriage between Morgan and Elizabeth Morgan. The question was, Whether the devise to the issue of Ebenezer was good by way of executory devise, or was a contingent remainder? If the former, the plaintiff was entitled to recover: but, if the latter, it was destroyed on the death of the tenant for life during Ebenezer's life, for want of a particular estate to support it.

LORD KENYON, Ch. J.—No arguments tend so much to seduce our judgments as those which are addressed to our passions; and therefore they ought to be discouraged in the Courts of Law. I verily believe that it would have been better for the public if the same rules of construction, which hold in the cases of deeds, had always been applied to wills. For we find that very few questions arise on the limitations of estates in deeds compared to those which arise on wills. Certain technical expressions were formerly adapted for the creation of particular estates; and, those being well understood, it seldom happens that others less definite are substituted in their room. Soon after the Statute of Uses, an attempt was made to introduce a different construction on deeds to uses from that which was put on common law conveyances; but that attempt failed of success, and the same rule of construction applies to both. However, it is now too late to apply it to wills: but, notwithstanding greater indulgence is shewn to wills than to deeds, we must take care not to depart from those rules which have been long established in the construction of wills. It was some time before executory devises were admitted by the Courts of Law; but being found of general utility, they were established in the time of Charles the First; and therefore it would be dangerous now to overturn them. But if ever there existed a rule respecting executory devises, which has uniformly prevailed without any exception to the contrary, it is that which was laid down by Lord Hale in the case of *Purefoy v. Rogers*, that
 “there

“ where a contingency is limited to depend on an estate of freehold, which is capable of supporting a remainder, it shall never be construed to be an executory devise, but a contingent remainder only, and not otherwise.” Now that rule applies to, and must govern, the present case. In *Hopkins v. Hopkins*, where there was a devise to trustees in trust for *S. Hopkins* the son of *John Hopkins* for life, remainder to his first and other sons in tail male, remainder to the other sons of *John Hopkins* successively, with like remainders to their first and other sons, &c. remainder to the first and every other son to his daughter *Sarah*; remainder to the first and every other son of *Anne Dare* in tail male, remainder to his own right heirs; and *S. Hopkins* died in the devisor’s life-time, without issue; *John Hopkins* had no other son; and no other remainder was *in esse* at the time of the devisor’s death but a son of *A. Dare*; the question was, Whether by *Samuel’s* death in the devisor’s life-time the several limitations between him and *Dare* were not become void? or, Whether the intermediate limitations should not enure by way of executory devise to any other son he might thereafter have? Lord Chancellor Hardwicke said, “ It seems to be allowed that if things had stood at the devisor’s death as they did at the time of making the will, the limitation in question would have been a remainder, by reason of *Samuel’s* estate, which would have supported it: so is the case of *Puresfoy v. Rogers*; and limitations of this kind are never construed to be executory devises, but where they cannot take effect as remainders.” And in that case it was expressly decided to be an executory devise on the ground of *Samuel’s* death in the life-time of the devisor. This point therefore has been too long settled to be now over-ruled.

Per Curiam,

Postea to the defendant.

TRINITY HOUSE v. SORBIERE.

The statute 4 *Anne*, cap. 20, for rebuilding the Edystone-Light-House, recites the danger to which ships are liable in passing the Edystone-Rock, and that in consequence of an agreement entered into between the Trinity-House and the masters and owners of shipping, the former, in consideration of receiving 1*d.* per ton outwards, and the like inwards, for all ships and vessels which should pass by such light-house, (coasters excepted, which should pay 12*d.* only for each voyage,) had in 1696 erected a light-house on the rock, to the satisfaction of the officers of ships of war, and of all others concerned in trade and navigation, and that it was preserved till 1703, when it was blown down. The preamble then states the necessity of rebuilding it; and, in order to encourage the Trinity-House so to do, the statute enacts that after the building, &c. and placing a light, &c. there shall be paid to the said master, &c. by the masters and owners of all English ships, hoys, and barks, which shall pass by the said light-house, so intended to be erected (except coasters,) the duty of 1*d.* per ton outward-bound, and also 1*d.* per ton inward-bound; that is to say, of the merchant one moiety, and of the owner of the ship the other moiety; and for all stranger's, or aliens', ships 2*d.* for every ton; and for coasters 2*s.* for each time they shall pass; the said several duties to be collected and received by such person as the master, &c. shall appoint in that behalf, in such port or place where such ship, &c. shall set forth, or where such ship, &c. shall arrive before they load or unload the goods therein.

An action having been brought by the Trinity-House against the owner of a British ship, for the Light-House duties imposed by this Act, and by the Charters of other Light-Houses, the ship having passed the Edystone and other Light-Houses, but not touching at any British port;

The question now upon a special verdict was, Whether this ship sailing from foreign port to foreign port, and not touching in Great Britain or Ireland, was liable to these duties?

Lord

LORD KENYON.—It is most evident that the words *inward and outward bound* restrain the payment of these duties to such vessels as depart from, or touch at, British ports. This is clearly proved by the act of the Legislature, who deemed it necessary to pass the statute of 8 *Anne*, in order to extend the liability to pay to such ships as touched in Ireland only. It is impossible to argue that foreign ships, sailing from foreign port to foreign port, are liable to be called upon for this duty. Upon principles of public policy then we ought not to impose upon our own ships, when engaged in foreign service, any burdens to which foreigners are not subject. In time of peace, our transports are engaged in foreign service, to the great increase of our navigation, the encouragement of trade, and the support of our seamen; but, if subject to duties to which foreigners are not, the latter will be able to let their ships at a lower rate, or the British freighter must pay the duties out of his own pocket, which will put a total stop to this species of trade. The case is too plain to admit of any doubt.

Judgment for the Defendant.

LOVELOCK *d.* NORRIS *v.* DANCASTER.

By statute 11 *Geo. II.* cap. 19, § 13, it is enacted, that the Court, where any ejectment shall be brought, may offer the landlord to make himself defendant by joining with the tenant when the declaration in ejectment shall be delivered, in case he shall appear; but, in case the tenant shall refuse or neglect to appear, judgment shall be signed against the casual ejector for want of such appearance; but if the landlord for any part of the lands, &c. for which such ejectment was brought, shall desire to appear by himself, and consent to enter into the like rule that by the course of the Court the tenant in possession, in case he had appeared, ought to have done, then the Court where such ejectment shall be brought, may permit such landlord so to do, and order a stay of execution upon such judgment against the casual ejector, until they shall make further order therein.

This was an application to the Court, to permit certain devisees to defend, instead of the tenant, against which it was contended, that, never having been in *possession*, they were not *landlords* within the meaning of the statute.

LORD KENYON.—If the person, requiring to be made a defendant under the Act, had stood in the situation of immediate heir to the person last seized, or had been in the relation of remainder-man under the same title as the original landlord, I am of opinion, that he might have been permitted to defend as a landlord, by virtue of the directions of the statute; but here the very question in dispute between the adverse party and himself is, whether he is entitled to be landlord or not; and therefore we are not authorized to extend the provision of the statute to such a case as this. As to the case mentioned, it appears to have been by consent.

Rule discharged.

KINLOCH, *Assignee of SANDIMAN and GRAHAM, Bankrupts*, against CRAIG, *Sequestrator of STEINE*.

The Court had before, upon motion for a new trial, determined upon this case, that, if a factor accept bills drawn by his principal upon the faith of consignments agreed to be made by the principal to the factor, and both of them become bankrupts before a cargo consigned come into possession of the factor, his assignees have no property in such cargo, and cannot recover the produce of it against the assignees of the principal, if they have sold it and received the purchase money.

Now, upon a special verdict, the Court again gave judgment for the defendant, without hearing any argument. This judgment was afterwards affirmed in the House of Lords upon a Writ of Error, where, in delivering the opinion of the Twelve Judges,

LORD

LORD CHIEF BARON EYRE observed as follows: that the parties acted entirely upon the faith of the agreement between them, that they (the bankrupts) should accept the bills drawn on them by the Steines, and should indemnify themselves out of the produce of the sales; in case any consignment should be made them; and if none, or those sales should fall short, then by remittances; and that the bankrupts should receive a salary of £.1200 from the Steines. And he said, that the transaction between them with respect to the consignments was as between principal and factor, and not as between vendor and vendee; that therefore Sandiman and Graham could have no property in the cargo; and the right of stopping *in transitu* was out of the question; that never occurring but as between vendor and vendee. And for this he relied on the case of *Wright v. Campbell & Burr.* 2050. That the bankrupts could have no lien in this case, as the special verdict found that the goods never got into their possession. That though the bankrupts might have given their acceptances on the faith that these consignments would be made to them, yet still it was an executory agreement, for the non-performance of which only a right of action accrued; but that no property in the goods was thereby vested in them. And that, upon the whole, they were of opinion, that the proceeds of the cargo of the ship were not money had and received to the use of the plaintiffs.

COURT OF COMMON PLEAS.

JUDGMENT delivered by LORD LOUGHBOROUGH, Ch. J.
in the following Case,

THEALE and Others v. The BISHOP of LONDON and Others.

This Case came before the Court by *quare impedit*, and respected the presentation to the Vicarage of St Stephens, near St. Albans, the circumstances of which are fully stated in the Judgment delivered by the Court.

LORD LOUGHBOROUGH.—The plaintiffs in this case are executors and devisees in trust, and intitle themselves to the advowson in question under the will of Caleb Lomax, whom the declaration states to have been seised in fee of the advowson, and to have presented on a former avoidance. To this declaration the defendant Edward Barker pleads four pleas. On the second and third, issue is joined; the first and fourth are the subject of the argument before the Court. The first plea states a title to the advowson in one Ellis, who presented in 1680; that Ellis conveyed it to Killigrew; that Killigrew devised it to his wife Lucy for her life, and that the reversion on the death of Killigrew descended to his three daughters in coparcenary. It then states an avoidance during the life of Lucy the widow, and a presentation by Lomax, the father of the testator, usurping on Lucy. It then states, that the living again became vacant after the death of Lucy, by the resignation of the then incumbent Romney; and that the Crown, by usurpation on the right of the eldest coparcener, presented again the same clerk. It then states an avoidance by the death of that presentee, and another presentation on that avoidance by Lomax usurping upon the right of the second coparcener. A title is then deduced at considerable length to the defendant from the second and third coparcener, concluding with a claim to present on the existing vacancy, in the third turn.

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A replication is put in to this plea; and that replication states a purchase by Lomax of the right of Lucy Killigrew, the widow, and a presentation of the advowson made by him during the life of Lucy, on an avoidance then happening. A fine is then set forth, levied by the three coparceners of the advowson, and a conveyance to Lomax under that fine. Having stated this title in behalf of the plaintiffs in answer to the plea, the replication concludes that the resignation of Romney was fraudulent and without notice, and traverses that upon that resignation it belonged to the eldest coparcener to present. To this replication there is a rejoinder by the defendant, in which the defendant traverses the fine; and to that rejoinder there is a special demurrer alledging as a defect, that there is a traverse taken upon a traverse.

In this part of the argument, it is incumbent on the plaintiffs to shew that their replication was good, and that the traverse with which it concludes was a material traverse. For if the replication be not good, and the traverse material, the consequence will be, that the plea is a good bar to the title which the plaintiffs have set up in their declaration. It is a certain rule that the plaintiff must recover on the strength of his own title. That rule is not at all controverted; but it is argued on the part of the plaintiffs, that a defect in the defendant's title will leave the plaintiffs in possession of the title upon which they have declared, unanswered; and that the defendant, when he pleads and sets forth a title in himself, puts himself in the situation of a plaintiff. This argument would be well founded if the plea which the defendant has put in were bad on the face of it, since in that case the first error in pleading would be committed by the defendant, and the general title which the plaintiffs have shewn in their declaration would remain unanswered. But in the case before us it is not so; the plea is on the face of it a good plea; there is no objection to the manner in which the defendant has pleaded his title. The plaintiffs therefore must shew a more particular title than they have set forth in the declaration, and they find themselves under the necessity of abandoning the general title on which they declared, and of shewing by the replication a better title than that which the defendant has stated in his plea. Accordingly they do so; for admitting the right of Killigrew, who is the ancestor under whom the defendant claims, the plaintiffs claim by virtue of a fine levied by all the coparceners. This, no doubt, is a full and complete answer

to the title set out in the plea. But then the plaintiffs, instead of resting on that title, instead of putting any matter in issue on that title, instead of drawing any conclusion on which there can be an issue, conclude with suggesting, that the resignation of Romney was fraudulent; and that the usurpation for that turn was not an usurpation on the right of the eldest coparcener; for that is distinctly the effect of the traverse. A great many cases were cited, to shew that this traverse was material; and I admit that is the point to be proved. But it cannot be material in the abstract; it is material or not, *quoad* the right to support which it is taken. Now the right insisted on by the plaintiffs in their replication, is a right, under the title of Killigrew, to the advowson by a conveyance from the three coparceners; and to that right so set out, whether the avoidance in question is in the first, second, or third turn, is of no sort of consequence. There is no question of turn, with respect to a person who claims in himself a title to the whole advowson; and the irrelevance of the traverse, taken by the plaintiffs to the title set out, cannot appear more strongly than by comparing this case with the case, 3 *Wils.* 214. which was cited in the argument to shew the sufficiency of the traverse on the part of the plaintiffs. In the case in *Wilson*, the title set up by the pleadings on each side was distinctly that of a presentation by turns. Neither the Company of Grocers, nor the Archbishop, pretended either of them to have the general right to present to the living. But, on the title deduced in the prior part of the pleadings, it was manifestly a presentation in which two turns belonged to the Archbishop, and one to the Grocer's Company. The title of the plaintiffs, therefore, was directly maintained by the traverse which was taken in the replication: the Archbishop had not only two turns, but the first turn was his confessedly *de jure*; the denying then that the plaintiffs had the right to the second turn, and the asserting that they had the right to the third turn, were in effect precisely the same propositions. By making good the point on which they took their traverse, they must, by necessary consequence, affirm and support the title set out in their declaration. But in the present case, admitting, what in all probability was true, that the right was not in the coparceners, it would not tend to shew that the plaintiffs had derived a right from Killigrew, who by confession of the pleadings was clearly, at one time, intitled to the right which descended on the coparceners, and which,

unless it was passed by them, would still remain in them, to be exercised according to the nature of their interest. It is said, however, that the defendant has rejoined informally, that he ought to have demurred to the replication. Now I take it, that wherever a traverse is immaterial, the other party may pass it by, and put in issue a more material part. But it is not necessary to consider, whether it were better for the defendant to have demurred to the replication, or to have rejoined as he has done; because, if the traverse be bad, the replication is bad, and the defendant is intitled to judgment on the plaintiff's replication. I doubt, however, whether it would have been safe for the defendant to have done that which would have permitted the averment to stand confessed, of the fine levied by the three coparceners to the use of Lomax in fee. If that be a substantive allegation, he has met it; if it be not, then the plaintiffs, having admitted the title in Killigrew, and the descent from him, have shewn nothing to avoid it, or to support any right in themselves; and the replication is no answer to the plea.

The fourth plea states the right correctly and truly, and is also agreeable to a former judgment of this Court on the same right of the same parties. There is but one objection made to it, namely, that it is pleaded, that the coparceners *did not* agree to present; and therefore, that on the first avoidance the presentation belonged to the eldest. The argument is, that, in the language of many books and some pleadings, the right of presenting by turns is said to arise when coparceners *cannot* agree; and many authorities have been quoted to prove this position. It is also laid down in *Bro. Tit. Present al Eglise*, 19. *Fitz. Nat. Brev. Qua. Imp.* 81. *Co. Litt.* 166. *Doctor and Student*, b. 2. c. 30. and is clear law, that the first presentation, in such case, of mere right belongs to the eldest, descends to her issue, goes to her husband by the curtesy, and passes by her grant. The expression then, that they *cannot* agree, therefore the exercise of the right must be by turns, is generally true. It is a legal presumption, that, on a right so circumstanced, they cannot agree. The eldest has it *pleno jure*; and the concurrence of the others would only operate to their own prejudice. But it is not a position of fact that they cannot agree, nor could any issue be taken upon it. If they do not agree, the eldest *must* present in the first turn; an actual agreement can alone prevent it. No authority has been cited to shew it to be bad leading to state that they *did not* agree; on the contrary, in
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the case of this very admission, the phrase in the pleadings is distinctly, that they "*did* not agree;" and the Court, in giving judgment, reason upon it as being precisely synonymous with "*could* not agree." Besides this, in a plea in bar, certainty to a common intent is sufficient. On this ground, therefore, the fourth plea is well pleaded; and on that also there must be

Judgment for the Defendant.

CROWN

CROWN CASES.

NEWLAND'S CASE.

At the Old Bailey, in February Session, 1784, *Abraham Newland* was indicted before Mr. Baron *Perryn*, present Mr. Serjeant *Adair*, RECORDER, for forging a bank-note, signed "WILLIAM LANDER, For the Governor and Company of the Bank of England,"

Mr. Lander was a cashier of the Bank of England, properly authorised by the Directors to subscribe bank-notes with his own name for the Governor and Company; and had given security to them for the faithful performance of this duty.

The Question was, Whether Mr. Lander was a competent witness to prove that the bank-note charged to be forged was not a genuine bank-note, and that the name "*William Lander*" subscribed thereto was not his hand-writing?

Mr. *Garrow*, for the prisoner, contended, that Mr. Lander was an incompetent witness, from the interest which he had in the event of the prosecution; for, upon a supposition that he had signed the note by virtue of the authority delegated to him for that purpose by the Court of Directors, and had issued it, so signed, without carrying it to the account of the Bank, he would be liable to a criminal prosecution for the fraud, and to a civil action on his security bonds, for the damage which the Bank might eventually sustain; and therefore, although perhaps he was not personally liable to the holder for the amount of the note, he was deeply interested to swear that the name subscribed to it was a forgery, as the only means of avoiding the detection of the fraud. An interest, however faint or remote, is sufficient to destroy the competency of the witness. A commoner who comes to say, that a common is not commonable but for such a number of cattle, or to such a description of persons; a corporation who would confine the exercise of a franchise; a parishioner in a question concerning the removal of a pauper; are all inadmissible witnesses, on the ground of interest; and yet their interest is extremely distant and minute. A master may maintain the suit of his servant; but if he acknowledges that he is under an honorary consideration to pay his costs,

he cannot be examined in his cause. Suppose a servant assaulted in defence of his master; if on the trial of an action for this injury the master was to declare, that although he was not bound in law to defray the costs of an acquittal, yet that in honour and generosity he ought not to permit his servant to suffer, his testimony would be rejected, from the presumed bias of his mind, on the ground of interest: for to use the words of Lord Mansfield, "Courts of justice do not sit to weigh what degree of temptation the minds of men are capable of resisting, but to take care that they shall not be exposed to any temptations whatsoever." If this were the case of a common forgery, the objection would be unanswerable: for it is settled that a person who has subscribed a note, and is therefore *prima facie* liable to pay it, cannot be examined to impeach the security; and the interest which Mr. Lander has upon the present occasion cannot be thought less considerable.

Mr. *Beauroft*, for the Crown. It has been the constant and unopposed practice of Courts to admit the cashiers of the Bank to prove the forgery of their signatures to bank-notes. It is certainly true, that when a witness is called to prove a proposition in which he is directly interested to say "Yes" rather than "No," he shall not be admitted as a witness to say "Yes." I admit also, that the question is not on the quantity of interest; for if an interest amounts only to five shillings, it is equally objectionable as if it amounted to twenty thousand pounds. I admit also, that if Mr. Lander came here to prove the forgery of his own note, he would not be a competent witness, because his own note he would be *prima facie* liable to pay: but Mr. Lander's signature as a Cashier of the Bank does not bind himself, for it professes to be "for the Governor and Company of the Bank of England;" and the holder of a note so signed can call only on the Governor and Company to pay it. The fact of Mr. Lander's not being personally liable, is a sufficient answer to this objection; for nothing but an immediate, direct, and personal interest is sufficiently strong to overthrow the competency of a witness. The objection indeed cannot be speciously stated, except on a presumption of Mr. Lander's having abused his trust; but the rule of law is to presume *innocence until guilt* is proved; and therefore an interest cannot be inferred from such a presumption, in order to ground an objection to the competency of his evidence.

The Court. This case is perfectly clear. Mr. Lander does not make himself personally responsible, by signing bank-notes in his own name "for the Governor and Com-

"pany of the Bank of England;" and the law will not permit so forced and violent a presumption to be raised, as that a man is guilty of a crime, in order to lay a platform on which to raise an objection to his competency on the ground of interest. To repel the evidence of a witness who comes to prove the forgery of his own hand-writing, it must appear that he would be liable to be sued in case it was genuine. The interest must be apparent on the face of the instrument itself, or arise immediately from the nature of the transaction, or from his own acknowledgement; for if a witness admits himself to have an interest, whether he has an interest in fact or not, yet the belief of it has an equal operation on his mind; and in either of these cases, it would be an objection to his testimony. In the present case, unless criminality be presumed, interest cannot be inferred: and such a presumption is certainly repugnant to the first principles of law.

Mr. Lander's evidence was accordingly received, but the prisoner was acquitted.

The KING against SPALDING.

At the Lent Assizes holden at Bury for the county of Suffolk, in the year 1780, *William Spalding* was tried for Arson, in having set fire to his *own house*. The indictment contained two general counts; the first describing the offence as at common law; the second concluding against the statute of 9 Geo. 1. cap. 22.

The premises were copyhold, of which the prisoner was tenant in possession; and on the day laid in the indictment, he wilfully set fire to a girder in the back part of the house, by the means of which a great part of the timber of *the roof* and the entire *thatch* of the house were consumed. The house was situated in the village of *Hartest*, detached from any other house; but there were other houses on each side of it, within the distance of four yards. In the month of January, 1776, the prisoner had surrendered the house into the hands of the lord of the manor, to the use of one Benjamin Nott, his heirs and assigns, for securing the payment of sixty pounds, with legal interest, on the third of July next following the date of the surrender; but Benjamin Nott had never been admitted upon the surrender. The prisoner had insured the premises from fire to a considerable amount,

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and had paid the premium to the Lady Day subsequent to the commission of the fact. The premises were also insured by Benjamin Nott, the mortgagee.

The Jury found the prisoner *guilty*; but the judgment was respited, and the following points submitted to the consideration of the twelve Judges.

First, Whether the indictment was properly adapted to the case?

Secondly, Whether any evidence as to the mortgage and surrender of the premises ought to have been received?

Thirdly, Whether, under all the circumstances of the case, the offence amounts to *Arson* at the common law, or to a felonious burning within the meaning of the statute?

On the first day of Easter Term, 1780, this case was propounded to Ten of the Judges at Lord Mansfield's Chambers; and they were unanimous, That as the indictment was for burning his *own house*, it was insufficient; for that the crime of *Arson* at common law consists in maliciously and voluntarily burning the house of *another*; and the statute of 9 Geo. 1. c. 22. does not alter the nature of the crime, or create any new offence, but only excludes the principal more clearly from the benefit of clergy than he was excluded before. The resolution in *Holmes's Case* has been too long established to be controverted, and the interpretation of the statute must be governed by that determination. The circumstance of the premises being insured makes no difference in this case.

The KING against BREEME.

At the Old Bailey, in April Session, 1780, *Andrew Breeme* was indicted before Mr. Baron Eyre, for that he, about the hour of twelve in the night, a certain house feloniously, wilfully, and maliciously, did set on fire and burn. The indictment consisted of six counts, charging the offence to have been committed, *first*, against the common law; and, *secondly*, against the statute 9 Geo. 1. c. 22. and laying it to be the house, *first*, of *William Bolton*; *secondly*, of *Stone Tappan*; *thirdly*, of *Andrew Breeme*.

The Jury found the prisoner *Guilty*; but the judgment was respited, and the question, Whether the conviction

was legal? referred to the Twelve Judges upon the following facts:

That the prisoner wilfully and maliciously set on fire and burned the house mentioned in the indictment: That he was tenant in possession of the house, under a written agreement for a lease for three years from Stone Tuppen: That Stone Tuppen had built the house under a lease from William Bolton for ninety-nine years: and, That William Bolton was tenant in fee simple of the land on which the house was built.

On the first day of Trinity Term, nine of the Judges assembled at Lord Chief Baron Skynner's Chambers; and they were unanimously of opinion, That the prisoner, under the circumstances of the present case, was not guilty of *Arson*. The law upon this subject, they said, had been too long, and too firmly established, by *Holmes's Case*, to be now departed from. Some of the Judges, however, seemed to doubt the propriety of that determination, and said, that if no question had been unsettled, they should have been of a different opinion; but the majority of the Judges held, that the determination of *Holmes's Case* was right, for that the principle of it was the protection of the person in the actual and immediate possession of the house. As to the statute Geo. 1. c. 22, they held, that it did not vary the nature of the offence as it stood at common law, that Act being merely intended to clear the doubt which had arisen from the reasoning in *Paulter's Case*, as to the exclusion of the principal offender from the benefit of clergy; and in this view, they said, it is considered in Mr. Justice Blackstone's Commentaries.

The KING against PEDLEY.

FIRST CASE.

This was a *Special Verdict* found at the Gaol Delivery for Bristol in 1782, on the trial of an indictment against *William Pedley* for *Arson*; and argued in the Court of King's Bench at Trinity Term, 22 Geo. III.

The indictment contained seventeen counts, in which the offence was respectively laid to be committed, *first*, against the house; and *secondly*, against the statute 9 Geo. I.

c. 22. Several of the counts distinctly charged, That the prisoner did *set fire to*, and *burn* the house of *Freeman, Lucy, and Giles*. Other counts charged, That he *set fire* to his own house, *with intent to burn* the house of *Freeman, Lucy, and Giles*, near to the prisoner's dwelling-house, by reason whereof the said house of *Freeman, Lucy, and Giles* was set on fire and burned. The neighbouring house was also laid to be the house, *first*, of *Francis Parry*; *secondly*, of *Richard Coombe*; *thirdly*, of *the Mayor of Bristol*. The prisoner was also charged in some of the counts with burning his own house. The several houses were respectively termed *dwelling-houses*; and the offence laid throughout to have been committed feloniously, wilfully, and maliciously.

The Verdict.—"All the houses mentioned in the indictment were the freehold and inheritance of the Mayor of Bristol, who had demised that in which the prisoner dwelt to *Freeman, Lucy, and Giles*, for the term of ninety-nine years, determinable with three lives. *Freeman, Lucy, and Giles* had demised the said house to the prisoner for seven years, part of which term was subsisting. The Mayor of Bristol had also demised three other messuages, adjoining to that in the possession of the prisoner, to *Richard Coombe* for a term of ninety-nine years, determinable as aforesaid; and *Richard Coombe* had again demised the said three messuages to *Francis Parry* for a year, and so from year to year, so long, &c. On 29th of September, 1780, *Francis Parry* demised one of these three messuages to *John Landy* for three months, who entered and continued in possession *until* and *upon* the 8th December, 1780; and this is the house that is alledged in the indictment to be the house of *Francis Parry*. The prisoner and *John Landy* being thus in possession of their respective houses, so demised as aforesaid, the prisoner, on the 6th December, 1780, unlawfully, wilfully, and maliciously set fire to, and set on fire the said house in *his* possession, with intent wilfully and maliciously to burn the same, and did thereby burn and destroy great part of the same; and by means thereof the said fire was communicated to the house in the occupation of *John Landy*, and burned and consumed part thereof. But whether upon the whole of these facts the prisoner is guilty of the offences charged in the indictment, the Jury submit to the Court.

Mr. Lawrence, as Counsel for the Crown, said, that three questions might be made from the facts disclosed by the Special Verdict. First, Whether the prisoner was not guilty of Arson at common law in burning his own house? Secondly, Whether it was not an offence within the meaning of the Statute

statute 9 Geo. I. c. 22. ? But he acknowledged that, notwithstanding the opinion of a great writer upon Crown Law to the contrary, he was apprehensive that the doctrine in Holmes's Case, *Cro. Car.* 533. upon this subject had been too firmly and recently established, for any arguments he could use *ab inconvenienti* to remove. In Breeme's Case, in the year 1780, it was determined by nine of the Judges, that a man is not guilty of felony in setting fire to his own house; and in Spalding's Case, about the same time, it was determined, with equal unanimity, that the statute 9 Geo. I. c. 22. had created no new offence.

Mr. Lawrence, therefore, confined his arguments to the *third question*, "Whether the prisoner's having burnt his neighbour's house by means of burning his own, was not an offence within the legal idea of *Arson?*" and contended, that where a man doth an act *malum in se*, wilfully and deliberately, and such act occasions a mischief, which, if it had been immediately done, would have been felony, the act which produced such mischief shall also be considered as felonious. "If A. tenant for years of a house, sets fire to it, intending to burn the house of B. and thereby he does burn the house of B. this is felony; but if he doth not burn the house of B. it is only a great misdemeanour, but no felony."

1. *Hale*, P. C. 568. *Dalton*, ch. 158. p. 506. Edit. 1727. "It seemeth," says *Dalton*, ch. 105. p. 270. "That if a man unlawfully shoot in a hand-gun, and the fire thereof sets another man's house on fire, and burn it down, it is felony." 3. *Inst.* 67. *Kely*, 117. 1 *Hawk.* ch. 106. *f.* 5. 4. *State Trials*, 222. Cases of murder constantly proceed upon this principle; and wherever death follows an act which is *malum in se*, and the event was probable from the act, the actor is answerable in *felony* for the consequences; for Mr. Justice *Foster* says, it is no excuse for the aggressor to say, that he did not intend all that follows.

Lord Mansfield. The law is now established and settled, that if a tenant set fire to the house of his landlord, he is not guilty of Arson. The legal definition of this crime is burning the house of *another*; and it was lately determined in Breeme's Case, by the unanimous opinion of nine Judges, that it is not felony to burn a house of which the offender is *in possession* by virtue of a *lease for years*; and this was also the title in Holmes's Case, which is now confirmed to be good law. I very much lament that the law is so settled. If it had been a new question, I should not have been *single* of a contrary opinion. The bias of my mind is in favour of Mr. Justice *Foster's* opinion, that "the house might with
strict

strict legal propriety have been considered as the house of the landlord;" and although he truly says, "that both landlord and tenant have a property in the house, the one temporary and limited, the other absolute and perpetual;" yet to decide, that he who has so trifling an interest in a house as a year or less should not be guilty of Arson by burning it; would, in my conception, require great deliberation. But as to that point of the present case, it is firmly settled, and the legislature alone can alter it. As to the third point, there is no doubt but that the propositions laid down are grounded upon the true principles of law when applied to certain cases; but whether the present is a case in which they ought to prevail, it seems immaterial to inquire; for the crime of Arson, as I have said before, is an offence committed against *the possession of another*; and Pedley has not been tried for burning the house of which John Landy was in *possession*, because, though in fact it was the house burned, the indictment has stated it to be in the possession of Richard Coombe.

Judgment was given for the prisoner, but he was remanded.

FRANCIS PARR'S CASE.

At the Old Bailey, in January Session, 1787, *Francis Parr* was tried before Mr. Serjeant *Adair*, Recorder, on the statute 31 Geo. II. c. 22. s. 77. for personating *Isaac Hart*, of *Windsor*, the true and real proprietor of and in 3900*l.* capital stock, and thereby falsely endeavouring to receive from the Governor and Company of the Bank of England the sum of 58*l.* 10*s.* 2*d.* and for half an year's annuity, as if he was the said true and lawful owner of the money.

It appeared in evidence, that the prisoner applied to Mr. George, the dividend-prayer of the three *per cent.* Consols at the Bank, for the dividend on 3900*l.* stock, in the three *per cent.* Consols, amounting to 58*l.* 10*s.*

The application was in the following form:—The prisoner said, "Isaac Hart, 3900*l.*" Mr. George asked, "What place?" The prisoner replied, "Of Windsor." Mr. George turned the dividend-book round to the prisoner, and he signed the name "Isaac Hart" as the proprietor. Mr. George then gave the prisoner a dividend-warrant for the

sum of 58 l. 10 s. which the prisoner indorsed in the name " of Isaac Hart."

In order to receive the money upon a dividend-warrant, it is necessary for the bearer of it to apply to the Pay-Office, which is situated at some distance from the office in which the warrants are delivered out; but it was in proof that the prisoner, instead of attempting to receive the money at the Pay-Office, had walked a different way with the warrant in his pocket, and no attempt was in fact ever made to receive it; for the prisoner was apprehended in about ten minutes after he had procured the warrant, as he was standing unconcerned in the Rotunda of the Bank.

It was contended in favour of the prisoner, that this evidence did not maintain the charge in the indictment, or satisfy the meaning of the statute on which it was founded. The legislature, they said, had made two distinct and independent acts necessary to be performed before the offence could be completed. First, That the true and real proprietor of the stock should be personated. Secondly, That the person personating the proprietor should endeavour to receive the money.

The words of the statute are, that " if any person or persons whatsoever shall falsely and deceitfully personate any true and real proprietor of the share or shares, or any part of any share or shares, annuities, or dividends, of or in such capital stocks or funds as have been established by the authority of Parliament, since the passing of the statute of the 8 Geo. I. c. 22. and thereby transferring or endeavouring to transfer the stock, or receiving or endeavouring to receive the money of such true and lawful proprietor, as if such offender were the true and lawful owner thereof; then every such person or persons shall be deemed guilty of felony, and suffer death as a felon without benefit of clergy."

In obtaining the warrant, the prisoner has certainly completed the first act which the statute mentions, of personating the true and real proprietor of the stock; by which means he was enabled to perform the other requisite to the completion of the offence, viz: endeavouring to receive the money. The mere act of obtaining the warrant cannot be construed an endeavour *thereby* to receive the money; because it is the instrument only by the means of which the endeavour is afterwards to be made. They are two distinct and separate acts. The warrant furnished the means of receiving the money; but if the party does not by the use of those means endeavour to receive the money, he has barely

procured the means of compleating the offence; but it cannot be said that he has *thereby* endeavoured to receive it. If the prisoner had gone to the Pay-Office, and tendered the warrant, or prepared, or shewed any design or intention so to do, it would have been an endeavouring thereby to receive the money; but instead of using any endeavour for this purpose, he silently put the warrant in his pocket, and walked a different way, without doing any act, or discovering the least intention to compleat the offence. It is evident, from the preamble and general scope of the Act of Parliament, that it was intended to prevent the property vested in the funds from being tortiously obtained by those who have no title to it; and to compleat the offence, the act done must be such as would effectuate the mischief which the legislature intended to prevent. No act, therefore, from which that mischief would not immediately and unavoidably result, can be considered within the meaning of the statute. An interval is afforded for repentance to interpose between the two acts of personating the proprietor, and endeavouring to receive the money; and if, during the progress of completion, the final perpetration of the crime is prevented, either by the suggestions of conscience, or by premature detection, the offender cannot be found guilty; for the crime, though commenced, is not compleated.

The Court were of opinion, That the act of personating the proprietor, and thereby obtaining the warrant to receive the dividend, was evidence of an endeavouring to receive the money; and the facts of the case being left with the Jury, they found the prisoner *Guilty*; but, on account of the importance of the question, and of the different manner in which this statute is penned from some others on the same subject, it was thought proper to respite the judgment, and to refer the point of law to the determination of the Twelve Judges.

Mr. Justice *Gould*, in the February Session following, after stating the form of the indictment, the facts that were given in evidence, and the words of the statute, delivered the opinion of the Judges to this effect:

This case has been taken into consideration by all the Judges, and has been attended to with deep and serious deliberation; and it is their unanimous opinion, That the manner in which the prisoner applied to the officer of the Dividend-Office at the Bank, and obtained the warrant, was a personating of Isaac Hart, the true and lawful proprietor of the stock; and that the prisoner thereby endeavoured to re-
ceive

ceive the money of Isaac Hart, within the true intent and meaning of the Act of Parliament. If he had actually received the money, he would have accomplished the mischief against which the legislature intended to guard; and then no possible doubt could have existed with respect to his guilt. The legislature, therefore, has sagaciously and wisely attempted to prevent the mischief, by enacting that no person shall endeavour, or take any steps towards obtaining the money which others have lodged in the funds. The question therefore is, Whether the prisoner did take any steps for this purpose? And the Jury have found that he came forward, personated, and assumed the name of a real proprietor. He called himself Isaac Hart. He wrote the name Isaac Hart in the Bank-book. The dividend-warrant is made out in that name, and in that name the prisoner endorsed it; by which indorsement, any person, who should be the bearer of it, was intitled to receive the dividend at the Pay-Office. This statement of the facts alone, without using any argument, is sufficient to shew that the prisoner, by personating the proprietor, and by obtaining and indorsing the warrant, thereby made an endeavour, as far as it went, towards receiving the dividend. The Judges, therefore, are unanimous, That the evidence supported the charge, and that the prisoner is legally convicted, within the meaning of this Act of Parliament.

The prisoner received sentence of death at the close of the Session, and was executed accordingly.

THE CASE OF JOHN HUGHES AND Others.

This was an indictment for Burglary with intent to steal, tried before Mr. Justice *Willes*, at the Old Bailey, in December Session, 1685.

It appeared in evidence, that the prisoner had bored a hole, with an instrument called a *center-bit*, through the pannel of the house door, near to one of the bolts by which it was fastened, and that some pieces of the broken pannel were found within-side the threshold of the door; but it did not appear that any instrument, except the point of the *center-bit*, or that any part of the prisoners bodies had been within-

side the house, or that the aperture made was in fact large enough to admit a man's hand.

The Court was clearly of opinion, That this was a sufficient *breaking*; but the doubt was, Whether it could possibly be construed such an *entry* as the law requires to constitute the crime of burglary? The point was argued by Counsel to this effect:

For the Prisoners.—Whatever notions may have prevailed upon this subject in times of high antiquity, it has been long established in theory, and confirmed by the uniform practice of ages, that there must be both a *breaking* and an *entering* to constitute the crime of burglary. They are distinct and separate acts; and “the words *fregit et intravit*,” says Lord Hale, “are indispensably necessary to an indictment for this offence; for breaking without entering, or entering without breaking, makes not burglary.” But the question in the present case is, Whether these acts can be said to be complete, unless they are carried into such a degree of effect as will afford to the burglar an opportunity of committing the premeditated felony? In burglary, there must be a *breaking in fact*; for a mere breaking in construction of law is not sufficient; and until the passing of the 12 Ann. c. 7. an *actual entry* into the house, subsequent to, and by means of, the breaking, was also required. There are, however, some cases upon this subject, in which it must be acknowledged, that, from an anxiety to preserve domestic security sacred and inviolate during the hours of night, the ancient principles of the common law respecting burglary have been construed with a latitude not usual in questions of life or death; and it has been held, that the smallest degree of *entry* whatever is sufficient to satisfy the law. Putting a hand or a foot, or a pistol, over the threshold of the door, or a hook or other instrument through the broken pane of a window, have been decided to be burglarious entries; but the principle of all these new determinations is, that there has been such a previous breaking of the castle of the proprietor, as to render his property insecure, by affording to the burglar an opportunity to commit the projected felony, of whatsoever kind or description that felony may be. By the introduction of such effective members of the body as the hand or the foot it is clear that there must be an opportunity afforded of taking out property, and therefore such entries are held sufficient. By the introduction of a pistol, terror is applied to the intruder, and the property is taken by means of fear. And in those cases where an instrument has formed any part of the

question, it has always been taken to mean, not the instrument by which the breaking was made, but the instrument, as a hook, a fork, or other thing, by which the property was capable of being removed, introduced subsequent to the act of breaking, and after that essential preliminary had been fully completed. Suppose the brick-wall of a house to be broken with a pick-axe, and that part of the pick-axe had, in the violence of breaking, been within-side of the house, could this have been held an *entry* to steal?

In the present case, the introduction of the instrument is part of the act of breaking; but it is impossible to conceive that it was introduced for the purpose of purloining property, for it is incapable of performing such an office. It was used for the purpose of breaking into the *domicile* of the proprietor; and if the breaking it effected had enabled the prisoners by any possible means to have taken goods through the aperture, that branch of the offence would most certainly have been completed; but as no property has been proved to lie near the hole, so as to be removed by means of a hand, hook, or other instrument, the degree of breaking itself seems insufficient. The cases that have been mentioned of entries by a hand, or a foot, or a pistol, all proceed on the idea that the breaking had been previously completed, and are considered as acts of dominion acquired by the breaking over the property of the owner; but there is not a case which has yet gone the length of determining, that the introduction of an instrument in the act of breaking shall satisfy the two acts which the law requires, *viz.* a *breaking* to obtain dominion over the property, and an *entry* to steal it.

The prisoners were acquitted.

The KING against BRAZIER.

This was a case reserved for the opinion of the Twelve Judges, by Mr. Justice Gould, at the Assizes for York, on the trial of an indictment for a rape on the body of an infant under seven years of age. The information of the infant was received in evidence against the prisoner; but as she had not attained the years of presumed discretion, and did not appear to possess sufficient understanding to be aware of the dangers of perjury, she was not sworn.

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The prisoner was convicted; but the judgment was respite, on a doubt, Whether evidence, under any circumstances whatever, could be legally admitted in a criminal prosecution, except upon oath?

The Judges were unanimously of opinion, That no testimony whatever can be legally received, except upon oath and that an infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the Court, to possess sufficient knowledge of the nature and consequences of an oath; for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence; but the admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the Court; but if they are found incompetent, their testimony cannot be received.

JOHN RUSTON'S CASE.

At the old Bailey January Session, 1786, on the trial of William Bartlet for simple grand larceny, John Ruston, a *mutus et surdus à natiuitate*, was produced as a witness on the part of the Crown.

Martha Ruston his sister, being examined on the *voir dire* it appeared that she and her brother had been for a series of years enabled to understand each other by means of certain arbitrary signs and motions, which time and necessity had invented between them. She acknowledged that these signs and motions were not significant of letters, syllables, words or sentences, but were expressive of general propositions, and intire conceptions of the mind; and that the subjects of their conversation had in general been confined to the domestic concerns and familiar occurrences of life. She believed, however, that her brother had a perfect knowledge of the tenets of Christianity, and was certain that she could communicate to him true notions of the moral and religious nature of an oath, and of the temporal dangers of perjury.

It was objected by the prisoner's Counsel, that although these modes of conveying intelligence might be capable of impressing the mind with some simple ideas of the ex-

of a God, and of a future state of rewards and punishments; yet they were utterly incapable of communicating any perfect notions of the vast and complicated system of the Christian religion; and therefore the witness could not with propriety be sworn upon the Holy Gospels. The difficulty of arraigning a man for perjury whom the law presumes to be an idiot, and who is consequently incapable of being instructed in the nature of the proceedings against him, was also urged against the admissibility of the witness.

But the Court over-ruled the objection? and John Ruston was sworn to depose "the truth," &c. and Martha Ruston "well and truly to interpret to John Ruston, a witness here produced in behalf of the King against William Bartlet, now a prisoner at the bar, the questions and demands made by the Court to the said John Ruston, and his answers made to them."

The prisoner was found guilty, and received sentence of transportation for seven years.

ANN GUY'S CASE.

At the Old Bailey, in April Session, 1782, *Ann Guy* was indicted as an accessory after the fact, in receiving *two guineas*, the well knowing them to have been stolen.

Mr. Baron *Eyre* said he was clearly of opinion, That there cannot be an accessory after the fact for receiving money. The statutes of 3 *Will. and Mary*, c. 9. s. 4. and 5 *Ann.* c. 31. s. 5. say, That whoever shall buy or receive any goods or chattles that shall be feloniously stolen, knowing the same to be stolen, shall be deemed an accessory after the fact to such felony; but money cannot be well considered as goods or chattles, within the meaning of these Acts.

The prisoner was acquitted.

GRIBBLE'S CASE.

At the Old Bailey, February Session, 1782, an indictment on the statute 5 *Eliz.* c. 4. was preferred, charging the prisoner with having stolen a watch from *Thomas Sheridan*, privately from his person, and without his knowledge.

The prosecutor had been drinking at a public-house with the prisoner, and being both of them much intoxicated, they went together to the prisoner's lodgings, where the prosecutor fell asleep, and, while he was asleep, the prisoner stole his watch.

The Court ruled this not to be such a stealing privately as would oust the offender from the benefit of clergy, within the meaning of the legislature; and mentioned the following case as having been decided by the Judges:—A person, who had become intoxicated at Vauxhall-gardens, fell fast asleep, in his way home, in one of the watch-houses or niches to Westminster-bridge. A waiter also from Vauxhall, passing that way, stole the buckles out of his shoes without waking him; and the Judges were of opinion, That the statute was intended to protect the property which persons by proper vigilance and caution should not be enabled to secure; but that it did not extend to persons who by intoxication had exposed themselves to the dangers of depredation, by destroying those faculties of the mind, by the exertion of which the larceny might probably be prevented.

The Jury found the prisoner guilty of stealing; but not privately from the person.

THE
LAWYER'S
AND
MAGISTRATE'S MAGAZINE,

For JANUARY, 1791.

S K E T C H E S

Of the Life and Character of PHILIP EARL OF HARD-
WICKE, late LORD HIGH CHANCELLOR OF ENG-
LAND, communicated to RICHARD COOKSEY, Esq.
and proposed to be inserted in his intended His-
TORY OF WORCESTERSHIRE,

SIR,

HAVING met with an Advertisement, wherein you mention a design of giving an Essay on the life of Philip Earl of Hardwicke, in your proposed History of Worcestershire, and inviting any information on that subject, I send you what occurs to the recollection of an old man of the law, who knew him well; of which you need not doubt the authenticity; and let me remind you of your duty as an historian:

*Ne quid falsi dicere audeat;
Ne quid veri non audeat.*

Be not therefore afraid of inserting the truths I shall from time to time send to you, as they shall occur to my recollection, and I find time to put them on paper; they will not, I profess, tend to flatter his Lordship's memory, or pay court to his illustrious descendants, but may be proper to be known and transmitted to posterity for the purpose of
form-

forming a right judgment of the real character of the man you undertake to delineate and exhibit to the public. It is your duty to represent him as he really was, without the flattery and embellishment which the biographers of eminent men generally pay to their subject. A good painter is to draw a likeness of the original, though the features may be harsh and unpleasing.

He was born at Dover, in Kent, in the year 1696. That he was literally the founder of his family and fortunes redounds to his honour rather than his dispraise; and therefore it is no disparagement to relate what is the undoubted fact, that his father was an attorney of no great eminence or possessions, indeed reduced at last to such indigence as drove him to despair and suicide. Of this circumstance his son Charles (a man highly accomplished in mind and manners, and of feelings most exquisitely delicate) was once cruelly reminded by a witness in a Kentish cause. The father however was attentive to the well settling and providing for his family: having married his two daughters, one to Mr. Billingsley, a Dissenting Minister, brother to the printer; and another to Mr. Jones, who proving unfortunate in business, lived for many years, and at last died, in the King's Bench prison; he prevailed on his agent, Mr. Salkeld, of Brook-street, Holborn, to take his only son Philip as his clerk; though his mother, a rigid Presbyterian, opposed it very much, and wished her son to be put apprentice to some *honester trade*, as she expressed it. This domestic distress, experienced and severely felt in his early years, narrowed his mind, and infected it with a love of money, which was his constant bias and blemish through life, and of which he could not divest himself when possessed of near a million.

During his clerkship he applied himself to business with uncommon diligence, and gained the entire good-will and esteem of his master, who, observing in him abilities and application that prognosticated his future eminence, entered him as a Student in the Temple, and suffered him to dine in the Hall during the Terms. But his mistress, a notable woman, thinking she might take such liberties with a gratis-clerk, used frequently to send him from his business, on family errands, and to fetch in little necessities from Covent-Garden and other markets. This, when he became a favourite with his master, and entrusted with his business and cash, he thought an indignity, and got rid of it by a stratagem, which prevented complaints or expostulation. In his accounts with his master there frequently occurred *couch-hire* for roots of celery and turnips from Covent-Garden.

and a barrel of oysters from the fishmongers, &c. which Mr. Salkeld observing, and urging on his wife the impropriety and ill housewifery of such a practice, put an end to it.

Mr. Salkeld, who was very eminent in his profession, as an attorney, and much esteemed by Lord Chief Justice Parker, was one day asked by his Lordship, if he could recommend to him a young man, decent and intelligent, to serve as a sort of law-tutor to his sons, and assist and direct them in their studies. He recommended this his clerk in the warmest terms, and he was immediately employed in that capacity; which he discharged so much to the satisfaction of the Chief Justice, that he soon became a favourite, and was distinguished by every private and public mark of his approbation and regard. Inasmuch, that upon Mr. Yorke's being called to the Bar, and Lord Parker being made Chancellor and Earl of Macclesfield, his partiality to so young a pleader, and the particular attention paid to him, gave great offence to many of the old practitioners in that Court. Serjeant Pengelly, in particular, was so disgusted at frequently hearing the Chancellor observe that *what Mr. Yorke said had not been answered*, that he one day threw up his brief, and declared he would no more attend a Court where he found *Mr. Yorke was not to be answered*. His resentment, joined with that of others in the same situation, brought upon the Chancellor that investigation of his private management and the abuses committed or connived at by him, in his appointment of the officers of his Court, which terminated in his impeachment and conviction.

This extraordinary attention to his favourite, and especially when he was fetched from his first circuit, in the year 1719, and made Solicitor General when he was scarcely twenty-nine years of age, over the heads of many able and eminent counsel, was well near being as fatal to Mr. Yorke as his patron.

From the precedence annexed to that post, he was to take the lead, and conduct all the causes he was employed in. The suitors at first hesitated at committing themselves to so young and inexperienced an advocate; and he was, on that account, left out of most of the important causes then depending. But the prevalence of attorneys, with whom he was as much a favourite as with the Chancellor, his own indefatigable industry and application, the gentleness of his manners, and insinuating complacency of his address, soon getting the better of those prejudices, he rapidly came into full business at the Bar; and the storm, raised by his premature promotion, fell wholly on his patron, of whose distress

distress he seems to have stood a silent and unconcerned spectator, though then Attorney-General, Member of Parliament, and Privy Counsellor; and his uncle, Sir Joseph Jekyl, was First Commissioner, with Sir Jeffery Gilbert and Sir Robert Raymond, to whom the Seals were committed on his resignation.

Willes, afterwards Chief Justice of the Common Pleas, used often to relate a circumstance not much to the honour of Mr. Yorke in their younger days. They began their professional career about the same time, but pursued it in a course and with a termination directly opposite each other; the one always cool, collected, and sedate; the other impetuous, inconsiderate, and eager. Mr. Yorke never said or did a foolish thing; Willes, though with equal, if not superior parts, was for ever guilty of both. He was not however wanting in paying proper court to the head of the law at that time, and flattered himself that he stood fair in the opinion and favour of Lord Macclesfield. But on a sudden he perceived a total change in the countenance and conduct of that great man to him, and that he was treated on all occasions with evident marks of slight and displeasure. Willes was warm and pertinacious in his protestations of never having deserved, in thought, word, or deed, the displeasure he lamented having incurred, and insisted on knowing the charge against him, and his accusers. The latter the Chancellor peremptorily refused; but, in compliance with his importunity as to the first, gave him a paper, containing the substance of a conversation, wherein Willes, in the gaiety of his heart, had treated the character and conduct of that great man with such pleasantries of ridicule, and allusions to gross circumstances and facts, as were indeed grounds for offence and resentment, and much the more so, for they were incontrovertibly true. This betraying what had passed in unguarded, and private conversation, Willes put to the score of Mr. Yorke, who was one of the company, wherein he could not but recollect he had committed himself with so little caution; and was one source of the habits of ill will in which they lived during most of their time. Never was a more complete contrast of characters exhibited than that of those two contemporaries and law rivals, nor stronger proof of the superiority of prudence and temper over parts, and an enterprising activity of mind. Each had their fortunes to make by their profession: Willes, at setting out, had the advantage in paternal property, and a liberal education, having been fellow of All-Souls-College, Oxford; yet, when arrived at the post of Attorney-General, though

their practice had been nearly equally productive to both, Mr. Yorke was worth upwards of fifty thousand pounds; and the other, by South-sea losses, and other projects, above ten thousand pounds in debt. When Lord Macclesfield's patronage ceased to be useful to Mr. Yorke, he cultivated and obtained that of the Duke of Newcastle in its fullest extent, and preserved it through his life. This proved infinitely more beneficial to him, than the friendship of the Prince of Wales, Sir Robert Walpole, and Lord Granville, by whom he was cordially beloved, did to Willes. The one was never at any trouble or expence in his elections to Parliament, the Duke constantly returning him for one or other of his boroughs; whilst Willes was frequently employed to harass the active members of the Minister, and give them opposition in their elections, at an expence not always repaid him. Thus, in the year 1734, Willes, then Attorney-General, was sent to Worcester, to oppose Mr. Sandys, the plodding, pains-taking second of Mr. Pulteney; and to whom Sir Robert Walpole bore the most decided aversion; by this he was much money out of pocket, and it fixed on him the resentment of the party; whilst Lord Hardwicke, by every civility and private gratification, had so ingratiated himself with the opposers of Sir Robert, who always considered his fall from power, and the loss of his majority in the House of Commons, in the year 1742, more owing to the secret practices of his pretended friends, the Duke of Newcastle and Lord Hardwicke (who were the only gainers in that change of Ministry) than to the efforts of his enemies. The Chancellor retained, undiminished, and in full force, the powers of the law department; disposing of its honours and preferments, and prevented the creation of Law Lords, whereby his power in the House of Lords, he apprehended, might be diminished. The peerages of Lee, Rider, Willes, and even of Parker, Chief Baron, though acknowledged due to their long services of the state, were delayed or denied. Thus he remained the sole Law Lord during the whole time of his Chancellorship, which makes a great drawback from the panegyric of his flatterers, that no decree of his was ever appealed from. It was evident, that to appeal from a decree of Lord Hardwicke to the House of Lords, was an appeal to himself. Indeed, his practice in the Court of Chancery, for which he is applauded as having introduced a regular system, was such as precluded all pretences for appeals of complaint. His decrees were very few, in comparison of the many causes that came under discussion in that Court, in his time. The

hearings,

hearings, re-hearings, references to Masters, reports, and exceptions to those reports, exorbitant fees to Counsel, and the length of time to which every cause was protracted, made the suitors weary, and glad to submit to any decree suggested and agreed upon by their Counsel, in which neither party could complain of being aggrieved by the Judge of the Court. In this plenitude of law power he continued till the year 1746, when the ministerial system of his Lordship and his friends, the Pelhams, met with a slight shock, and was nearly deranged, by an effort, made by the good old King, to deliver himself from a weak, selfish, and corrupt Administration. His Majesty wished to put the reins of government into the hands of his able, spirited friend, Lord Granville, and appointed him Secretary of State. The time was ill chosen: a rebellion, formidable only by the weakness with which it had been at first opposed, was still unquelled. The good King's favourite son, absent in pursuit of the distant enemy, a total defection and abdication of all his other ministers and servants, had not been foreseen or apprehended at such a crisis, and for such a cause. The resignations began with Mr. Pelham, Chancellor of the Exchequer, the whole Board of Treasury, and would have been followed the next day by that of the Duke of Newcastle, Lord Chancellor, and all the great Officers of State. Even Winnington, the Paymaster, whom the King and Lord Granville personally loved, came to resign; so prevalent and invincible did this combination appear to him, that he said, "The only way to keep his place, he saw, was to give it up." Every one knows the confusion and danger that must have attended this measure was prevented only by the magnanimity of Lord Granville, who insisted on the King's submitting, and renouncing his appointment. This event proved fortunate only to a Doctor Birch, who ought to have been preferred by the Chancellor long before. A more amiable, worthy, and indefatigable man in the literary world never existed; recommended often and most earnestly to the Chancellor by his sons, with whom he lived in habits of the most perfect friendship, and whom he had insulted by the offer of a preferment in Wales of thirty pounds a year. This good man he sent to on the day he was about to resign, and gave him the living of St. Margaret Pattern, Fenchurch-street, then fortunately vacant. But for this circumstance, the good Doctor might have much longer remained unprovided for, as his Lordship, in the disposal of church preferments, had chiefly in view the strengthening and extending his attachments, by obliging the great men
who

who applied to him for them. Few were conferred as rewards of learning or merit during the whole time of his being Chancellor. He even made a merit of providing for his own and his lady's relations with a very sparing hand, pretending to have laid down a rule, never to give more than one living to one person. Even his brother-in-law, Billingfley lived and died upon the rectory of ----- in Oxfordshire, from which he derived little more emolument than he received before from the dissenting congregation at Dover, of which he was minister. He indeed conferred two preferments, the vicarage of St. Martin, and the prebendary of Rochester, on a most amiable and worthy divine; whose character is so justly and elegantly expressed in the inscription on a monument erected to his memory, in the abbey church at Bath, that I cannot refrain transmitting you a copy of it.

On a black Marble Monument, with white Tablet.

To the memory of ERASMUS SAUNDERS, D. D. Vicar of St. Martin's in the Fields, and Prebendary of the Cathedral Church of Rochester. His life was an example of the most extensive benevolence, joined to the practice of every religious and social duty: his death, a lesson of that composure and resignation, which the hope of immortality, grounded on a well-spent life, could alone inspire. He died, December 29, 1775, in the sixty ninth year of his age.

If gentlest manners, sweet good-natur'd ease,
If placid virtue, with strong sense, can please;
Here, reader, pause, nor check the swelling sigh,
Nor stop the tear, which bursting to the eye
Will mourn with me, they were not longer given,
To bless the earth, and seek a later heaven.

But I must observe to you, that these emanations of his Lordship's favour were not conferred on the good Doctor from any attention to the amiable qualities justly ascribed to him in this epitaph. The truth is, that a Canonry of Windsor, which he had obtained, by the favour of the Duke of Marlborough, being thought a more eligible and proper situation for Mr. James Yorke, who had lately entered into Holy Orders, and whose name I mention with reverence and respect, than the much more lucrative living of St. Martin's, then vacant, the Doctor was prevailed upon to make the exchange, and thereby forfeited the fa-
vour

vour, and lost the patronage, of that noble family; which ever after embittered, and indeed shortened the life of a man who, but for this false step, might have been advanced to the highest station of the church; to which his successor in that patronage at present does honour. Another very worthy and learned divine, to whom, in 1738, he gave the living of St. George, Southwark, from motives which did him honour, having declined the proffer of marrying a Mrs. Jones, his Lordship's own sister, whose husband died in the King's Bench prison about that time, and who, by a constant attendance on him, had acquired habits which rendered her not a proper comfort for a clergyman, could never obtain any farther preferment from his Lordship, though what he gave him amounted not to the value of the fellowship of Merton College, which he quitted on the prospect of such a promising patronage. Except in these instances, scarcely one of the many livings and preferments in his disposal appear to have been given either in reward of merit, or from private or personal favour. They were made to serve his great view of extending his influence, and ingratiating himself with the powerful families of the party he was connected with, and who divided the right they assumed of recommendation to church preferments into cantonments of the counties they possessed, and wished to preside over and govern. By this management, and the most insinuating art of address and command of temper, which he possessed in the highest degree, his influence and weight in both houses of Parliament was immense, and far beyond what was ever before enjoyed by any man in his station, or in this country. Firmly united with the Pelhams, who, after Sir Robert Walpole's giving up the Treasury, had, by an union with the leaders of the pretended patriots of those days, obtained a clear and decisive superiority in parliament, Lord Hardwicke, from being an excellent and attentive Chancellor, became, unhappily for his country, a politician, and a first-rate Minister in the succeeding arrangements. The event of 1746 had given that Administration a complete command over their Sovereign; and the depravity and corruption that prevailed in the succeeding parliaments secured them from any controul on that side; so that for many years after the death of Mr. Pelham, in 1754, the whole power of the state centered in the Duke of Newcastle, and his friend and director Lord Hardwicke, without whose advice and participation that Duke never made the least movement. Under their auspices were made the several alterations and arrangements of Ministry in

1755 and 6. In those, places and pensions were distributed so liberally as to preclude almost any shadow of opposition, in either House of Parliament, to any measure Government thought proper to adopt. But these measures proved so weak, pusillanimous, and disgraceful, as at length to rouse a spirit of resentment and indignation in the people at large. This alarmed the fears and apprehensions of Lord Hardwicke, of which his nature was very susceptible, and to which the great responsibility in which he and his connexions, particularly Lord Anson, his son-in-law, stood, to whom the loss of Minorca was generally imputed, gave sufficient foundation. Dreading the loud cry of the people for impeachments and inquiries into the authors of those councils which had brought the nation into such a calamitous and desperate situation, he wisely shrunk from the storm he thought he saw bursting on his head, and in 1756 resigned the Seals, as did Lord Anson his office of first Commissioner of the Admiralty. The Duke of Newcastle also quitted the treasury, so that for sometime the kingdom was left without any administration at all. But leaving to writers of the general history of those times a description of the deplorable state to which the country was then reduced, you will confine yourself to the parts in which Lord Hardwicke stood conspicuous. The marriage-act, whatever praise or dispraise is annexed to it, was exclusively his own. The bill for general naturalization of the Jews enacted in one session, and the repeal of it in the next, was a measure congenial to his principles and pusillanimity. These unpopular acts, his unremitted opposition to every plan for establishing a national militia, and the fetching a foreign force to protect the country from an invasion, which he timorously expected and dreaded, had made him obnoxious above any other member of administration to the people at large, though his power and influence in a House of Commons, debased by the grossest corruption, and lost to all national and manly spirit, remained in its full force. By a happy coalition which took place in 1757, wherein he and his colleague the Duke of Newcastle furnished their prostitute majority to the friends and favourites of the people, who ensured them safety and indemnity, the threatened inquiries and cries for punishment of the delinquents were baffled and eluded, and the noble Duke and Lord Hardwicke again formed an arrangement of ministry perfectly to their own satisfaction and that of the public. In this transaction let me inform you of a manoeuvre

vre of his Lordship, in his department of disposer of law dignities, in which he gratified the malignity he had ever borne to Willes, by a stroke decisive on his family and fortune. The latter who had been appointed first Commissioner of the seals, during the short abeyance of administration, and was considered and looked up to in the common course of such events as the undoubted successor to the office of Chancellor, thought he had disarmed the effects of antient bickerings, by settling all the distribution of offices and emoluments of the Court, on Lord Hardwicke's resignation, to the entire satisfaction of his Lordship. Philip Carteret Webb, whom he recommended even with tears to his successors, was gratified to his utmost wish, and the kindest countenance of the Court promised and expressed to his son Charles, then young at the Bar. So far were matters settled, that a peerage, pension, and tellership of the Exchequer, were agreed as of course to attend the appointment. What a blow did Willes feel when these demands, as they were called, having been represented to their Sovereign as unreasonable and improper to be granted, occasioned an inquiry whom else these negotiators of preferment had to recommend? They immediately named Mr. Henley, who indeed did honour to the nomination; and, to the surprise of the world and even of himself, he was nominated Keeper, as a man who *stipulated* for no conditions or emoluments, which are sure to follow the appointment, as they did in this case. So much for Willes, who died soon after with a heart broken by the many mortifications and disappointments which the arts of his successful rival, and his own want of discretion through life, had heaped upon him.

The events of this year, 1757, in which the national honour and vigour was sunk to the lowest pitch, and when popular resentment against the weak and corrupt administration, to which they attributed the disgraces and losses sustained in the Mediterranean and America, had well nigh proved fatal to the fortunes of Lord Hardwicke and his son-in-law Lord Anson, displayed the wise and politic conduct of the former in its great lustre, and raised his power and influence to an height beyond what they ever reached before or after that period. The good King, accustomed to submit implicitly after some impotent struggles for employing in his service the men he loved and lived with) to the dictates of the Duke of Newcastle, who was as implicitly directed by Lord Hardwicke, was induced by them to admit the favourites of the people, Mr. Pitt and Mr. Legge, into the cabinet.

and commit to them the absolute management of the war and foreign affairs.

The nation at once, by a sort of inherent elasticity, recovered from the despondency into which it was sunk, and displayed a spirit that, rebounding, rose higher from its fall. All opposition in parliament ceased, and a perfect unanimity prevailed through the kingdom. The new leaders brought with them the support and countenance of all good men and real friends to their country; and disdaining the traffic of jobs, or soliciting places and pensions for their adherents, left that field open to the old practitioners in those arts, who were in possession of that corrupt majority, now so happily applied. The whole subordinate arrangement of ministry in that year was made by Lord Hardwicke, whereby his ambition, as well as his resentments, were fully gratified. Lord Anson being restored to the head of the Admiralty, the offence given by Mr. Sandys, having been one of the Board that had succeeded him, was punished on the father. Lord Sandys, pleased with the distinction of being Speaker of the House of Lords, with a large salary, was displaced without the least previous notice or compliment; and having made himself necessitous by the expence of constant oppositions, whilst a commoner, with which Sir Robert Walpole treated him, as the motion-maker of Mr. Pultney, and by joining with him in a considerable loan to the deceased Prince of Wales, wholly lost by his death, was compelled to submit to accept a pension from the Crown, by constantly declaring against the granting and accepting of which he had obtained all his popularity. His entreaties to avoid this disgrace, as he thought it, and that it might be covered by any nominal place of business, as Chief Justice in Eyre, Chairman of Committees, or the like, as it had been for some time, were ineffectual. He then begged the grant might specify its being made in reward for services performed, and payable at the Exchequer, not by Lord Gage, then Pay-master of the Pensions. This was granted him: and he was told, he might draw up the preamble of his patent himself: which he did; and preferred being paid at the Exchequer, subject to the taxes, rather than as a pensioner, which would have been exempt from them. In vain did Lord Sandys plead, that it was the absolute act of private friendship in Lord Winchelsea, who insisted on his son's being one of his Board;—the offence was never forgiven, and that courtly connexion which had so long subsisted between them, to their mutual advantage and

reciprocal benefit, was wholly put an end to: and the pretended and once popular patriot sunk into the degraded pensioner of the Crown.

Another large and liberal pension was also bestowed at this time on Mr. Mallock, or Mallet, a Scotchman, of no great respectability as a writer or a man. He was employed by Lord Hardwicke, when the nation was exasperated by the ill success of the beginning of the war, to turn the public resentment and vengeance upon Byng; which he attempted to do in an accusation and severe invective against that Admiral, under the style and character of a *Plain man*; a pamphlet dispersed and circulated throughout the nation with great industry and some success. For this seasonable intervention, and service he had bestowed on him an annual stipend, which he retained to his death. But if this be urged as an instance of his Lordship's benevolence to men of genius, and patronage of literary merit, let it be recollected that the same man, on his succeeding Talbot as Lord Chancellor, deprived Thompson, a poet and patriot of the first class, of the place of Secretary of Briefs, which had been given him by his predecessor, and was the poor poet's only subsistence and support. The indigence and distress to which he was hereby reduced was happily relieved some years after by his friend Lord Lyttelton, when he came into power.

Many other instances of the plenitude of power possessed by Lord Hardwicke at this time. I could enumerate to you, but will confine myself to one, involving an important transaction relative to his private family and concerns, and perhaps accounting for a public one not suspected, or in the least comprehended, at that time or since: to elucidate which I must enter rather minutely into his domestic affairs and connexions. A Mr. James Coeks (the brother of his excellent lady) was the heir and successor of the great Lord Somers, and possessed estates and acquisitions to a much greater amount from his father, who married the sister of that Lord, than from Lord Somers himself. He indeed made scarcely any addition to his paternal estate (avarice, as Swift acknowledges, he had none) beyond the grants forced upon him by King William, of certain fee-farm rents, and the manor of Rygate in Surrey. The value of the latter consisted chiefly in the influence annexed to it, on the election of two members, which that borough returns to Parliament; both of whom, after the decline of Alderman Parson's interest there, were uniformly nominated by this family, no other individual possessing

possessing property in the borough of weight sufficient to warrant any competition against the burgage tenures and manerial rights they were in possession of. Mr. James Cocks, who was always one of the members, was a plain, honest, unambitious country gentleman; and by a second marriage (the issue of his first, the sole heir of the Bradford estate, being dead) with the only daughter of Lord Berkeley of Stretton, had a son born in 1737, at this time a youth of the finest and most promising parts and amiable accomplishments, much caressed in the family of Frederick Prince of Wales, and the playfellow of his children about the same age. His present Majesty, (if his memory fail him not) may recollect the friend and favourite of his youth, his every evening almost being spent in play and boyish amusements at Leicester house. The Prince, who had a peculiar antipathy to the Chancellor, had given this youth unfavourable impressions of his uncle, and alarmed him with suspicions of clandestine attempts to undermine his interest in this borough, and establish a claim to a joint weight in the election of its representatives; of which one of his sons had usually, from their near relationship to the proprietor, been complimented with the nomination. Discovering on inquiry, as he thought, some grounds or such suspicions, and having roused his father, always extremely indolent and inattentive to business, into an alarm for the danger that threatened this his favourite property, he prevailed on him to throw into the fire a will he had made, whereby he had left the guardianship of this his son and the management of his affairs, during his minority, to Lord Hardwicke, and to make another, delegating that trust to a young Worcestershire nobleman, of consummate honour and bright abilities, in conjunction with his own brother, a very honest, but unbred, country gentleman, with a large family of children; and, though very rich, penurious and covetous in the extreme. The father died soon after making this disposition of his affairs; and, on the will being produced, though bearing every internal and formal evidence of the sanity of the testator, it was controverted by Lord Hardwicke; and, contrary to all his habitual prudence, the persuasions of his own family, and the advice of the ablest civilians of the times, Dr. Lee and Hay, he instituted a suit in the Commons, wherein he endeavoured to prove his brother-in-law an idiot, and incapable of making a will. This irritated his son beyond all bounds; and though the worthy Judge of the court, Dr. Bettefworth, rejected all such allegations with due indignation, and confirmed a will,

which

which itself proved the sanity of the testator, yet did the attempt sink deep in the mind of the young man, and gave him the most poignant inveteracy against this his uncle. He was now, in the year 1758, within a few months of being of age. Possessed of youthful ardour and an active spirit, he had taken a military turn, to which he was encouraged by his two uncles, who now acted in concert with respect to his education and the management of his concerns. Mr. John Cocks having, in the arrangement then made, been gratified with douceurs to himself, and preferments and employments for seven of his sons, by which they were all amply provided for, gratitude completely bound him to make due returns to his benefactor. The young gentleman had been sent to make a campaign, as volunteer in the army of the King of Prussia during the most active operations of the German war. From thence returning safe, he was incited by the persuasions of a young friend, the nephew of a respectable clergyman of the name of Wells, under whose care he had been educated with the greatest privacy at his living of Remnan, near Henly upon Thames, to embark in the expeditions then carrying on for invading the French coasts; a measure planned and adopted by Mr. Pitt, merely to expose and degrade the idle panic of preceding ministers, who had frightened themselves and the nation with an apprehension that a few flat-bottomed boats, and landing an enemy on our coasts, would be decisive of the fate and general ruin of the country. This paltry apprehension had been the source of all the disgraces and losses of the former year in the Mediterranean and America, by keeping at home the fleet and force which foreign services required. This end of Mr. Pitt's was fully answered, and the public spirit revived and set at right by the public display of our national strength, and the alarms given the enemy by the attack of St. Maloe's and Cherbourg. Both he and the nation revolved against continuing such a futile and maroding plan of operations; of which the success, supposing it the highest, could never balance the expence of the expedition. That to St. Lunaire bay was universally decried. No military officer of name or eminence could be prevailed on to accept the command of the forces, which seemed destined to destruction; and poor General Bligh lamented most emphatically his having been decoyed into that service, when fetched from Ireland without previous notice or instructions. Alarmed as the French had been, he foresaw they would be prepared, and foretold the fatal event of the attempt. "These expectations"

"ditions," says he, in a letter to Mr. Pitt, exculpating his conduct, "are to be considered as *attempts*; and troops sent on such a service as a *forlorn detachment*, the whole of which may perish at a particular time with propriety, and to the satisfaction of every good man, as putting things at the worst, the State incurs no danger;" and, as a true military man comforts himself, that in the engagement of the rear-guard at St. Cas the number of the killed and wounded of the enemy was by far greater than ours. Upon this service was this youth, of such high expectations, sent in company with his friend Wells; not as a volunteer; as such he might have retreated in the first boat attending the embarkation: but dignified with the commission of *Ensign of a Company of the Grenadiers* in the Guards allotted for this service; whereby he had the post of honour consigned him of being the first to land upon, and the last to quit, the enemy's coast. No doubt, according to General Bligh's idea, every good man, and the noble Lord himself who had kindly procured him that commission, felt a satisfaction when the Gazette announced the following short list of the killed in that unfortunate and most ill-conducted action at St. Cas.

OFFICERS KILLED.

| | |
|--------|--|
| GUARDS | { Major General Drury. Captain Walker. ENSIGN COCKS. |
|--------|--|

| | |
|-----------|---|
| MANNERS'S | { Lieutenant Mose. Lieutenant Wells. And only six others. |
|-----------|---|

And it occurred to few, that by the death of *Ensign Cocks* the property of a borough, returning two members of the British Parliament, a personal estate of one hundred thousand pounds, and a real one of eight or ten thousand pounds a year, was transferred to his worthy relations. What part Lord Hardwicke had in this transaction I pretend not to determine; but cannot help observing that at this æra, sheltered and protected by the impenetrable shield of Pitt's popularity, he was in the zenith of his political power. Under that shield he dealt out, in full force, the darts of his resentments and private favour, and directed the whole artillery of ministerial influence in bestowing subordinate places

places and pensions, by which one good end was obtained, the suppression of all parliamentary opposition, and an absolute acquiescence in the measures adopted by that truly great man. I think also, that in the instructions to poor Bligh the pen and style of a Chancery draftsman is very discernible; and that in reality no other success did accrue or was hoped for from this enterprise than the getting rid of this ill-fated young man, who was so near entering life in so brilliant a style, with such éclat and power, as his fortune and connexions would have given him, full of resentment against a relation by whom he was so justly provoked, and high in personal favour with his future Sovereign. This I venture to affirm is the only clue by which the seeming absurdities that occurred in the conduct of that retreat, the night march by beat of drum, and other mismanagement, taken notice of by Smollett and every historian of the time, can be solved or accounted for. This fulness of power, as a subordinate minister and the dispenser of douceurs, requisite for gaining and managing majorities, in which he and his friend the Duke of Newcastle were signally dextrous, he retained till a new King and enterprising favourite broke through the shackles in which the good old George the Second had been so long held. Lord Hardwicke had no share in the merits or dishonour of the peace which soon followed the demise of the Crown, and the dismissal of Mr. Pitt. His political career closed with a transaction quite in his own style of arranging a ministry; the ridiculous event of which, and his disappointment in not obtaining the post of President of the Council, on which he had long set his heart, chagrined him so much as perhaps shortened his life, which he quitted the year after. The account given by himself of this extraordinary transaction, in a letter to his son Lord Royston, deposited in the British Museum among Dr. Birch's papers, is so expressive of his genius and character, that his historian ought to give it at large. To save you the trouble of applying for it at the Museum, and directing you to N^o 4325 of Mr. Ayscough's Catalogue, where the original may be found, I have transcribed and sent it to you.

Letter from the EARL OF HARDWICKE to his son LORD
VISCOUNT ROYSTON.

MY DEAR LORD.

Wimble, Sept. 4, 1763.

I have heard the whole from the Duke of Newcastle; and on Friday morning, *de source*, from Mr. Pitt. But if I was to attempt to relate in writing all that I have heard in two conversations, of two hours each, *the dotterells and wheat-ears would sink* before I could finish my letter. Besides, it is as strange as it is long, for I believe it is the most extraordinary transaction that ever happened in any Court in Europe, even in times as extraordinary as the present.

I will begin, as the affair has gone on, preposterously, by telling you that it is all over for the present, and we are come back, *re infectâ*

It began, as to the substance, by a message from my Lord Bute to Mr. Pitt at Hayes, through my Lord Mayor, to give him the meeting privately at some third place. This his Lordship (Lord B.) afterwards altered by a note from himself, saying, that, as he loved to do things openly, he would come to Mr. Pitt's house, in Jermyn-street, in broad day-light. They met accordingly; and Lord Bute, after the first compliments, frankly acknowledged that his ministry could not go on, and that the King was convinced of it; and therefore he (Lord B.) desired Mr. Pitt would open himself frankly and at large, and tell him his ideas of things and persons with the utmost freedom. After much excuse and hanging back, Mr. Pitt did so with the utmost freedom indeed, though with civility. Here I must leave a long blank to be filled up when I see you. Lord Bute heard with great attention and patience, entered into no defence, but at last said, "If these are your opinions, why should you not tell them to the King himself, who will not be unwilling to hear you?"—"How can I presume to go to the King, who am not of his Council nor in his service, and have no pretence to ask an audience? The presumption would be too great."—"But suppose his Majesty should order you to attend him; I presume, Sir, you would not refuse it?"

"it?"—"The King's command would make it my duty, and I should certainly obey it."

This was on last Thursday sevensnight.—On the next day (Friday) Mr. Pitt received from the King, an open note unsealed, requiring him to attend his Majesty on Saturday noon at the Queen's palace, in the park. In obedience hereto, Mr. Pitt went on Saturday at noon day, through the Mall, in his gouty chair, the boot of which (as he said himself) makes it as much known as if his name was writ upon it, to the Queen's palace. He was immediately carried into the closet, received very graciously: and his majesty began in like manner as his quondam favourite had done, by ordering him to tell him his opinion of things and persons at large, and with the utmost freedom; and, I think, did in substance make the like confession, that he thought his present Ministers could not go on. The audience lasted three hours; and Mr. Pitt went through the whole upon both heads more fully than he had done to Lord Bute, but with great complaisance and *douceur* to the King; and his Majesty gave him a very gracious *accueil*, and heard him with great patience and attention. And Mr. Pitt affirms, that in general, and upon the most material points, he appeared by his manner and many expressions to be convinced. But here I must again avail myself of my long blank, and make only one general description; that Mr. Pitt went through the infirmities of the peace; the things necessary and hitherto neglected to improve and preserve it; the present state of the nation, both foreign and domestic; the great Whig families and persons which have been driven from his Majesty's council and service; which it would be for his interest to restore. In doing this he repeated many names; upon which his Majesty told him; there was pen, ink, and paper, and wished he would write them down. Mr. Pitt humbly excused himself, by saying, that would be too much for him to take upon him; and he might upon his memory, omit some material persons, which might be subject to imputation. The King still said he liked to hear him, and bid him go on; but said, now and then, his honour must be consulted; to which Mr. Pitt answered in a very courtly manner. His Majesty ordered him to come again on Monday; which he did, to the same place, and in the same public manner.

Here comes in a parenthesis, that on Sunday Mr. Pitt went to Claremont, and acquainted the Duke of Newcastle with the whole, fully persuaded from the King's manner and behaviour that the thing would do; and that on Mon-

day the outlines of the new arrangement would be settled. This produced the messages to the Lords, who were sent for. Mr. Pitt undertook to write to the Duke of Devonshire and the Marquis of Rockingham, and the Duke of Newcastle to myself.

But behold the catastrophe of Monday. The King received him equally graciously; and that audience lasted near two hours. The King began, that he had considered of what had been said, and talked still more strongly of his honour. His Majesty then mentioned Lord Halifax for the Treasury; still proceeding upon the supposition of a change. To this Mr. Pitt hesitated an objection—that certainly Lord Halifax ought to be considered, but that he should not have thought of him for the Treasury.—Suppose his Majesty should think fit to give him the Paymaster's place? The King replied, "But, Mr. Pitt, I had designed that for poor G. Grenville? he is your near relation, and you once loved him," To this the only answer made was a low bow. And now here comes the bait. "Why," says his Majesty, "should not Lord Temple have the Treasury?" "You could go on then very well."—Sir, the person whom you shall think fit to honour with the chief conduct of your affairs cannot possibly go on without a Treasury connected with him. But that alone will do nothing. It cannot be carried on without the great families, who have supported the Revolution government, and other great persons, of whose abilities and integrity the public has had experience, and who have weight and credit in the nation. I should only deceive your Majesty, if I should leave you in an opinion, that I could go on, and your Majesty make a solid administration on any other foot. "Well, Mr. Pitt, I see (or I fear) this will not do. My honour is concerned, and I must support it." *Et sic finita est fabula. Vos valet;* but I cannot with a safe conscience add, *plaudite*. I have made my skeleton larger than I intended at first, and I hope you will understand it. Mr. Pitt professes himself firmly persuaded that my Lord Bute was sincere at first, and that the King was in earnest the first day; but that on the intermediate day, Sunday, some strong effort was made, which produced the alteration.

Mr. Pitt likewise affirms, that, if he was examined upon oath, he could not tell upon what this negotiation broke off, whether upon any particular point, or upon the general complexion of the whole; but that, if the King shall assign any particular reason for it, he will never contradict it.

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My story has been so long, though in truth a very short abridgement, that I shall not lengthen it by observations, but leave you to make your own: It will certainly be given out, that the reason was the unreasonable extent of Mr. Pitt's plan—a general rout; and the minority, after having complained so much of proscriptions, have endeavoured to proscribe the majority. I asked Mr. Pitt the direct question; and he assured me, that although he thought himself obliged to name a great many persons for his own exculpation, yet he did not name above five or six for particular places. I must tell you, that one of these was your humble servant for the President's place. This was entirely without my authority and privacy. But the King's answer was, "Why, Mr. Pitt, it is vacant, and ready for him; and he knows he may have it to-morrow, if he thinks fit."

I conjectured that this was said with regard to what had passed with poor Lord Egremont, which made me think it necessary to tell Mr. Pitt in general what had passed with that Lord (not owning that his Lordship had offered it directly in the King's name), and what I had answered, which he, in his way, much commended.

This obliges me to desire that you will send me by the bearer my letter to you which you were to communicate to my Lord Lyttleton, that I may see how I have stated it there, for I have no copy.

I shall now make you laugh, though some parts of what goes before make me melancholy, to see the King so committed, and his Majesty submitting to it, &c. But what I mean will make you laugh, is, that the Ministers are so rung with this admission, that they cannot go on (and what has passed on this occasion will certainly make them less able to go on); and with my Lord Bute's having thus carried them to market in his pocket, that they say Lord Bute has attempted to sacrifice them to his own fears and timidity; that they do not depend upon him; and will have nothing to do with him; and I have been credibly informed, that both Lord Halifax and George Grenville have declared, that he is to go beyond sea, and reside for a twelvemonth or more. You know a certain cardinal was twice exiled out of France, and governed France as absolutely whilst he was absent as when he was present.

Your's affectionately,

HARDWICKE.

P. S. Co

P. S. On second thoughts the preceding account will be defective, unless you give some account of his person, and what the French call his *petits morales*, of which, from your youth, you can know nothing but by information. He was one of the handsomest men of the age, and bestowed great attention to his appearance and dress. By this he attracted the approbation of his lady, the niece of Sir Joseph Jekyll, whom he occasionally met with at the Rolls; to whom he proved most properly and affectionately attached; nor was ever guilty of playing the fool (which was always his term for intriguing) with any other woman. The reports, circulated in those times, relative to Lady B——and Mrs. Wells, I consider as idle tales, without the least foundation in truth. He was a perfect pattern of temperance and sobriety. His meals were not even convivial. After his dinner, which was generally late, he latterly dozed for some minutes, during which his lady kept up some degree of cheerful conversation. On recovering, and her retiring a stiff and ceremonious talk took place, in which, to involve his son Heathcote, when he was of the party, he would observe, that Rutlandshire being the least county in England, his father, Sir Gilbert, was supposed to be in possession of one half of it; and, if he goes on to accumulate as he has done, bids fair to be the proprietor of a whole county, a point in which no man in England ever yet arrived. On this some sycophant would observe, that his Lordship might perhaps be charged with a similar view, in regard to the county of Cambridge; for though Wimble as yet bore no proportion to the whole, yet the title deeds of a full moiety of it might be already found there:—a smile. The stately and ceremonious reception of his visitors, on a Sunday evening, was insipid and disgusting in the highest degree. For the vanity displayed in the painted windows of the chapel at Wimble, his family offer in excuse that the several arms of the illustrious names, connected with the house of Yorke, were collected, blazoned, and presented to him by Mr. Prouse, member for the county of Somerset. Stranger as he was to the life and habits of county gentlemen, he treated them with insulting inattention and *hauteur*. Came they from ever so great a distant part of the county, either to visit his Lordship, or see his place, their horses were sent for refreshment to the Tiger, a vile inn, near half a mile distant, as I have experienced more than once. He had no love for the country or peculiar taste for improvement. Wimble exhibited scenes magnificent and vast, with-

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out being pleasing to the eye. He submitted indeed, like other Lords, sometimes to entertain the *natives*, but with that visible and contemptuous superiority as disgusted rather than obliged them. When in high good humour he had two or three stock stories to *make his company laugh*, which they were prepared, and expected, to do. One was of his bailiff Woodcock, who, having been ordered by his lady to procure a sow of the breed and size she particularly described to him, came one day into the dining-room, when full of *great company*, proclaiming, with a burst of joy he could not suppress, "I have been at Royston fair, my lady, and got a sow *exact-ly* of your Ladyship's size." He also used to relate an incident that occurred to him in a morning ride from Wimple. Observing an elegant gentleman's house, he conceived a wish to see the inside of it. It happened to be that of Mr. Montague, brother to Lord Sandwich, who being at home very politely without knowing his Lordship, conducted him about the apartments, which were perfectly elegant; and expatiated on the pictures, some of which were capital. Among these were two female figures, beautifully painted in all their native naked charms, drawn from the life. These ladies, says the master of the house, you must certainly know, for they are most striking likenesses. On the guest's expressing his perfect ignorance, why, where the devil have you led your life, or what company have you kept, says the Captain, not to know Fanny Murray and Kitty Fisher, with whose persons I thought no fashionable man like *you* could be unacquainted? "On my taking leave and saying, I should be glad to return his civilities at Wimple, what surprise and confusion did he express on his discovering he had been talking all this *badinage* to Lord Hardwicke!"

His great accomplishment was an evenness of temper and command over his passions, which scarcely ever suffered him to be transported into any indiscreet action or intemperate or indecent expression of resentment. This constant calmness I never knew forsake him but in one or two instances, which fell under my observation. In the debate on the Marriage-act, in the house of Lords, which was opposed with warmth in the other house by Mr. Fox, his Lordship's zeal for this his favourite measure betrayed him into unbecoming and rather abusive expressions towards his antagonist, calling him, in the warmth of invective, *that bad, black man*. Similar passion and intolerance of contradiction betrayed him into a mean and unmanly threatening to some, who withstood him

attempts to defeat his brother Cook's will, that they should feel severely the effects of his displeasure and resentment; that a Lord Chancellor had a long arm, which should reach them in whatever station or situation of life they might be placed, and however safe they might think themselves, and out of his reach. This threat too he executed with an implacable vengeance; one gentleman I know suffered from his persecution, and the long arm of Chancery, a loss of many thousand pounds; and another, a very learned and ingenious physician, well known and esteemed at Paris, and I believe still living there, was by it driven for many years from his country, degraded in his character, and nearly ruined in his profession.

Dr. Johnson, in the Life of Addison, vol. II. p. 167, well and wisely observes, that the necessity of complying with "the times, and of sparing persons, is the great impediment "of biography." History may be formed from permanent monuments and records, but lives can only be written from personal knowledge, which is growing every day less, and in a short time is lost for ever. What is known can seldom be immediately told; and when it might be told it is no longer known: the delicate features of the mind, the nice discriminations of character, and the minute peculiarities of conduct, are soon obliterated; and better were it much should be silently forgotten, however it might delight in description, than that by unseasonable detection a pang should be given to a descendant, a brother, or a friend. Impressed by this consideration, and feeling that we are *walking upon ashes, under which the fire is not extinguished*, I forbear enlarging on every circumstance my recollection suggests to me, whereby it might be made appear that it is possible for a man, even in this enlightened age and nation, to raise himself to the highest eminence of wealth and honours (as they are called) without possessing a single spark or shadow of public virtue, or contributing the least atom to the happiness, improvement, or honour of his country or of mankind.

Of this, if you have any doubt, young gentleman, I recommend to your perusal the Diary of George Bub Doddington, published by Mr. Windham, and the very honest and sensible account of it by the Editor. Where you will see by what dextrous management of the marketable ware (*borough interest*) left him by a relation, George Bub, the son of an apothecary, in Dorsetshire, raised himself to some of the highest

highest offices of the state, and the title of Lord Melcombe. This publication, such as was never before committed to paper, should always accompany the memoirs of Lord Hardwicke, as the proper commentary on the times and transactions of that Lord and his associates in administration.—Heaven send us better and less corrupt!

With every good wish for your success in this and all your undertakings, I am your's, &c.

**GENERAL RULE of COURT made in the
COURT of KING'S BENCH, Michaelmas
Term, 31 Geo. III.**

It is ordered, That the Clerk of the Rules of this Court shall, for the future, keep a book in which shall be entered all the rules which from time to time shall be delivered out in ejectments, instead of the present book, containing a list of the ejectments moved; in which book shall be mentioned the number of the entry, the county in which the premises lie, the names of the nominal plaintiff, the first lessor of the plaintiff (with the words "and others" if there be more than one), and also the name of the casual ejector. *And it is further ordered,* That, unless the rule for judgment shall be drawn up and taken away from the Office of the Clerk of the Rules within two days after the end of the Term in which the ejectment shall be moved, no rule shall be drawn up or entered in the book, nor shall any proceedings be had in such Ejectment.

OLD BAILEY SESSIONS, DECEMBER 1, 1790.

Proceedings against RENWICK WILLIAMS, commonly called the MONSTER, whose Case was reserved for the Opinion of the JUDGES, which was now delivered by Mr. Justice ASHHURST, as follows :

Renwick Williams, you have been tried at the Old Bailey Sessions, in July last, (vide the Trial at Large in our Magazine for July, 1790, page 393,) on an indictment founded on a statute made in the 6th year of the reign of his late Majesty, King George the 1st; and the indictment charges, that you, on the 18th of January, in the 30th year of his present Majesty's reign, at the parish of St. James's, in a certain public street, called St. James's-street, wilfully, maliciously, and feloniously, did make an assault on Ann Porter, spinster, with intent, wilfully and maliciously, to tear, spoil, cut, and deface her garments; and that you on the said 18th of January, in the parish aforesaid, in the said public street, did wilfully, maliciously, and feloniously, cut, tear, and deface her silk gown and shift, being part of her wearing apparel which she then had on, and wore on her person, against the form of the statute; upon this indictment the Jury have found you guilty; but your Counsel made two objections in arrest of Judgment; the one to the form of the indictment, and the other to the substance of it, namely, that the facts as proved, did not constitute the offence intended to be punished by this Act of Parliament. A majority of the Judges are of opinion that both the objections are well founded; in respect to the first, the words of the statute make it necessary that the assault and the tearing should be at one and the same time; whereas, here it is not laid as the same act; but for any thing that appears on the face of this indictment, it may be that the assault was on one part of the day, and that the tearing of the clothes might be on another part of the day; because it does not say that you made an assault on such a day, and then and there tore the clothes, but that you made such an assault on such a day; and that on the said 18th of January, you wilfully tore the clothes. Now, the law in favour of a prisoner, requires the utmost precision, and is

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not to be made out merely by inference; therefore the indictment was certainly not properly or accurately laid: with respect to the other part of the objection, that the case, as proved, was not substantially within the intent of the Act of Parliament; a majority of Judges were likewise of opinion that it is not. The occasion of enacting this law, was, that a crime of a very extraordinary and unaccountable nature was then committed, by tearing clothes in the street for the mere sake of mischief; and to bring this case within that Act of Parliament, the primary intention of the person must be the tearing of the clothes; whereas, your primary intention appears to have been the wounding the person of the prosecutrix: the Legislature never looked forward to a crime of so diabolical a nature, as that of wounding his Majesty's subjects in a most savage manner, for the mere purpose of wounding them, without any provocation to the party; if they had, it is probable they would have annexed a still higher punishment for such an offence, than that in this Act of Parliament; but as the Legislature did not apprehend, and of course have not provided for it, it does not fall within the province of those who are to expound the law, to usurp the office of the Legislature: but though you are not within the lash of this law, as far as a felonious act, the common-law remedy is still open upon an indictment for a misdemeanor; and if the fact should be proved to the satisfaction of the Jury, the common law is armed with sufficient power to punish the offence, so as to make a man repent of his temerity, in having been guilty of so flagrant a breach of it. At present you will be remanded.

Prisoner.—I beg leave to address the Court for a few minutes. My Lord, after a confinement of six months, as disgraceful as it has been distressing to me, I feel little satisfaction at the interpretation of the statute, which has neither cleared my character as a man, nor established my innocence in the eye of justice; at last I am only reserved for severer trials, though the letter of the law may not apply to a cruel conviction. I have suffered prejudice, which arms Justice with new whips to scourge me. My case remains the very same it was five months ago; I have no new evidence to offer; such of the family as were present with me in Dover-street, at the time Miss Porter was wounded, have already given their testimony; that testimony has not been credited; as it was the true, being the only testimony I have to adduce, if it did not avail me then, it will not for the future. Much as I have been abused and labelled in

the public prints, and bad as a persecuting world will be disposed to think of me, I will neither suffer people to perjure themselves, or prove another *alibi*; my innocence, however, has not wanted an advocate. After the publication of this, Gentlemen, was I to stand a second trial, the same perjury that pushed them on to convict me before, would only be multiplied for the purpose of strengthening those witnesses, as the learned Gentleman in his letter to the Judge who tried me, has pointed out; and therefore I do not feel the least exultation in discovering that after a cruel and bitter confinement of six months, I have only exchanged a less misery for a greater. Good God! for what am I reserved? without friends! without either money to support me in my difficulties, or to enable me to stand another trial with those whom reward has enriched, and whose case has made friends of all men, it is impossible that a poor and helpless individual as I am, should struggle with the stream, or prevail with those who have determined they will not be convinced. I stand an instance of singular misfortune; while my passion for the sex has nearly been my ruin, that the singular charge of a nature directly opposite, should completely be my destruction. I have now nothing to hope for or to look for in this world: to my God alone, to whom my innocence is known, and whom, in this instance, at least, I have not offended, I turn with comfort for support, though justice be denied me here; a Father so kind and merciful will not refuse me, when I demand it of my prosecutor in that Great Day when the Judges of this Earth will themselves be tried. Most cheerfully should I have sought amongst savages in another country, that protection which has been denied me in this. I have nothing farther to add, my Lord.

He was then remanded, being charged on several indictments for assaults, to be tried at the Middlesex Quarter Sessions.

On Monday the 13th of December, 1790, Renwick Williams was brought from Newgate to the New Sessions House on Clerkenwell-Green, to take his trial for several assaults committed on the Miss Porters and others; and being set to the bar, addressed the Court as follows:

Prisoner.—The prejudice of the times being somewhat abated, I look round to those who are to protect my innocence, with more confidence of impartiality than I formerly experienced in another place. I trust they will this day restore me to society: the same Almighty Being who has so recently chastised me, will, I trust, not always extend his rod, but will this day defend me from my enemies; relying not more on your justice than on your humanity, I at once plead not guilty; for should I plead guilty for the sake of form, a mistaken world might be apt to think I actually am guilty, not knowing the reasons and motives that might induce me so to do: I said I would plead guilty; but I have since determined not to confess guilt under those circumstances, though by so doing I should avoid much perjury from my prosecutors. Sir, your deep penetration, will, I trust, pierce the veil with which my accusers have endeavoured to conceal the truth from your sight; and your well-known candour and impartiality will not suffer Falshood to triumph over Truth and Innocence. You sit there not clothed in the terrors of an angry and sanguinary judge, but with that mildness of Humanity with which you always smile at Innocence. In your hands I feel myself safe, and I look up to you with conscious hope for support, in the whole of this trial: yours is the voice of Justice, because it is the voice also of Humanity: to talk to you of prejudice, were an insult, not more to your justice than to your understanding. That I have suffered from prejudice, is certain; but I forgive my prosecutrix, and esteem the former Jury for the very verdict they gave me, because they gave it as they believed it: in the same manner I shall respect yours, let it be what it may: I am confident that no other than truth will prevail: if you think me guilty, in the name of God pronounce me that very monster that my soul abhors, and from whose savage hands, I would this moment, at the risk of my life, rescue the very woman who has so barbarously pursued me: to your verdict I submit without a murmur; and should you think me guilty, let the pains of the law be what they may, I shall continue to trust an Almighty God, to enable me to support those sufferings with the fortitude of a man. Once more, Sir, I address myself to you: neither my poverty, my distresses, nor my long confinement, save me from the obloquy of those, whose purses have long been open to criminate me at all events; you Sir, are neither a severe nor unjust Judge; and though I have suffered one conviction, trusting to your mildness and to your candour I submit to take my trial.

CHAIRMAN of the Sessions, WILLIAM MAINWARING, Esq.

Counsel for the prosecution,

Mr. Pigott, Mr. Fielding, Mr. Shepherd.

Counsel for the prisoner,

Mr. Swift.

Clerk of the Peace.—Gentlemen of the Jury, The prisoner is indicted for that he being a person of a wicked and cruel disposition, did, on the 18th of January last, make an assault on Ann Porter, spinster, and did then and there with force and arms, maliciously beat, wound, and ill-treat her, with wicked intention, feloniously, wilfully, and of his malice aforethought, to kill and murder her; and that he did then and there, with a certain knife, maliciously cut, strike, and wound her, giving her, by such cutting, striking, and wounding, with the knife aforesaid, a dangerous wound in and on the right thigh of her, the said Ann, of the length of nine inches, and the depth of four inches, by means of which she was in great pain and anguish, and lost a great quantity of blood, and was in great danger of losing her life.

A second Count, charges him, for that he, on the 18th of January, in the parish aforesaid, did maliciously make an assault on Ann Porter, and then and there with a certain knife, maliciously did strike, cut, and wound her, giving her by such striking, cutting, and wounding, with the knife aforesaid, a dangerous wound on her right thigh, of the length of nine inches, and the depth of four inches, by means whereof, &c.

A third Count, charges him on the 18th of January, for that he with force and arms did maliciously make an assault on her, and then and there did maliciously beat and bruise her, so that her life was despaired of.

The indictment opened by Mr. Shepherd, and the case by Mr. Pigott, as follows:

Gentlemen of the Jury, You have probably many of you, perhaps all of you, been so frequently called upon to assist in the administration of the justice of your country in that important character, in which you are now invested, that it would be very unnecessary for me to attempt to give you any description of that offence which the law in the technical

cal language it is accustomed to use, has denominated an assault and battery: you know very well the nature of that offence; you know in general to what you are to apply the evidence you hear when such an offence is opened. Gentlemen, if this description of the prisoner's offence would convey to your minds any adequate idea of it, it would be very unnecessary either for me, or for any person Counsel against the prisoner charged with an offence like this, to give you any very laboured or detailed description of it, undoubtedly it would; but, Gentlemen, such is the state of the law in this country, (though I am sure you will presently see, on the smallest consideration, it is no reproach to that law,) that that very peculiar, and very extraordinary crime, unprecedented as it is, and which I hope will furnish no example to others, that extraordinary crime which it is my duty to day to open to you, those who prosecute, are reduced to the necessity of prosecuting it as an assault and battery only. Gentlemen, the business of legislation in making laws by which the peace and welfare of society are to be secured, is the effort of civil wisdom, founded on common experience; the legislators are not speculatists on crimes; legislators are not speculatists on the human heart; they cannot foresee all the miserable courses of depravity which it will take, they must therefore proceed according to experience and to civil wisdom; they must provide for such crimes as that experience shews to have been committed; we are perfectly familiar, therefore, with those crimes by which the high roads are infested, and with the lesser depredations in the streets; those also, by which peaceable citizens are disturbed in their dwellings in the night, and so of all the various descriptions of crimes, with which Courts of Justice are unfortunately too familiar, with these you are well acquainted; but with a crime of the description that I am to have the misfortune to state to you to day, no human legislature, no man who had in his power at any time heretofore the task of forming a rule for the conduct of his fellow citizens, could possibly be acquainted, and it therefore stands unprovided for, as hitherto it must be, but as I hope it will be, according to your verdict, and the sentence of this Court, for the most humane mind will think that the severest punishment ought to follow upon a crime of such a nature; a crime, Gentlemen, baffling all human speculation, confounding all the chronicles of this Court, and similar Courts, in all ages of the world. Gentlemen, it is yet however true, that this crime has been committed; and if in looking for a motive for

searching for any possible inducement, you should find that search defeated, I am sure you have too much experience yet to doubt the fact, which will be proved to you beyond the possibility of a cavil. I must take the liberty to remind you, that it would be a most melancholy circumstance for the public justice of the country, if after a criminal has committed crimes of the description which I shall here lay before you, because he is capable of adding one vice more to those which he possessed, namely, that of cant and hypocrisy; because he is capable of coming into a Court of Justice, and presuming to call his Maker to witness his innocence, and address a Jury as he has just done in your presence, and will, no doubt, do again, on the nature and extent of his sufferings, that he is to mock public justice, and go out of Court in a situation to do again what he has already done; or that because he has the effrontery to set up an *alibi*, you are of course to believe it. (Here the learned Counsel minutely related the circumstances of the case, declaring that he had not words to express the dreadful injury, the shocking barbarity, the brutality, the ferocity, of the prisoner, who, in total want of all morality, of all humanity, and of all the claims of manhood, had made this attack on the person of Miss Porter.) On the point of identity, Mr. Pigott observed, if the circumstances of their having often before been insulted by him in the streets, and now seeing him so plainly on the night the wound was given, leave reasonable doubts about identity, there is an end of human testimony; no man can be identified that one does not live with, and eat and drink with and see all day. Gentlemen, this is the outline of the case I shall have to lay before you; I shall not anticipate the nature of the prisoner's defence. Gentlemen, in the discharge of the duty, which is now upon you, you have this satisfaction, that whereas, in other cases, though the law will have sacrifice, yet undoubtedly, your hearts often bleed over the victims that we are obliged to drag to the altar of Justice; but in the present case, all the sensibilities of a good mind must have the contrary effect here; we must know that the consequence will be, that this man will be prevented from doing such mischief for a time at least, and we are to hope, that he will be disposed of, after he has suffered the sentence of the law; he has had the benefit of that law already; the venerable Judges, who administer and interpret it, have been of opinion, that even against *him*, when they had in contemplation such a crime as *his*, that the spirit and letter of a statute is not to be stretched an iota, even in his case.

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therefore, Gentlemen, here we are before you, on an indictment of an assault and battery, and I am persuaded you will do in this case, between the public and the prisoner, that justice which will give the most complete satisfaction.

He then produced the evidence; which being the same as was given on the former Trial, we refer to our account of that proceeding, Vol. I. p. 393.

After the Evidence was finished, Mr. Swift opened the Prisoner's Defence, as follows:

Gentlemen of the Jury, I never felt myself in a more awkward situation in my life than I do at this moment; not that I have a bad case to defend, for I think that I have an exceeding good one; but the difficulty I have to contend with is, with gentlemen of great abilities, so great, that I cannot add to them by any praises of mine; I feel my own deficiency. I have been bred to the profession, as you see, but, very unhappily, I am very much out of the habits of it; I shall therefore hope for some candour and allowance, if through the impetuosity of my temper, or any other cause, I should fall into a mistake. I have another circumstance to encounter; a popular idea has gone forth, but I trust it is very ill-founded indeed, that I have an enmity to the sex, and that no man would take up this cause, that had not; these are calumnies, however, that no man will venture to my face, and I am sure there is no woman that will. Gentlemen, the cause of beauty is that cause which every man must be proud to be engaged in; but, on the other side, the closest investigation of the case, the more I examined into it, the more innocent I found this man. Gentlemen, the learned Counsel, Mr. Pigott (and I do not mean to impeach the principles, integrity, and virtue, of the worthy Gentleman), observed, that the character of Mr. Angerstein could not be impeached; now, although a man may mean extremely well, yet rewards of a very high and exorbitant nature are attended with a dangerous influence; and in the calendar of the country, instances may be found of men who have not only trump up evidence to obtain rewards themselves, but to get it for others; I do not mean it is so this day; the legislators have fixed on rewards of a certain sum; and I must say, when a private individual steps out of that line which is constitutionally appointed on those occasions, however he may not err in his heart, he certainly errs in his judgment; the influence which

which rewards have, if it has not been employed on some part of the evidence you have heard to-day, has been received by others, and you will judge what credit you will give to that man, I mean Coleman. Gentlemen, I am very unused to public speaking; I have been about this business all day; and if I am in a labyrinth, you will get me out. My learned friend, who first addressed you, called the address that the poor prisoner made to you, cant and hypocrisy; he said it was nothing more than cant to call his Maker to his innocence, that it was a mockery of public justice: I presume not; and shall establish it to your satisfaction: the Gentleman has softened the expression, by calling it tricks that have been played before: he said they were a fine family, and that they are a fine family you have had a sufficient proof; the Gentleman should have left that to you: I know very well the power of beauty; I know very well its influence on the human heart; certain I am you are not men if it would not have an influence: they are a fine family; but because they are a fine family, justice must not lean all on one side: I shall now, Gentlemen, go into some part of the evidence; and I believe some of you have taken notes more correctly than I have: first, I must press on your memory the circumstantial and very strong declarations of the two first witnesses, and Mrs. Neale, with respect to the hour that they came out of the ball-room; that hour is the best part of my case; therefore I desire you will remember it was a quarter after eleven: Gentlemen, the only question for your consideration is, Whether the person who committed this outrage was the man at the bar? Miss Sarah Porter tells you that just as she passed, a chair was going by, and she felt at that instant a stroke from somebody, who I am very ready to admit was the person that wounded her sister; that they ran all together, and both described that person, whoever he was, struck that woman and toppled down; one knew him as he stooped down, and the other knew him as he stood up. Gentlemen, I shall call a witness to you, that shall prove to you, that there is literally a bow-window on each side the door, which sufficiently intercept the lights. Gentlemen, your own reason, without my proving it, will tell you, that if there is an interception of light on the right and on the left, if a man stands with his back to the light, it is impossible the light can fall on his face; the only question is, Whether, under all the circumstances of the case, this was the man who committed that outrage? Miss Sarah says she knew him by the lights in the passage; that she saw a man, and afterwards
believed

believed him to be the man; that I will not dispute; the brother, however, though he held the door in his hand, recollects nothing of him; why not? He did not know him before; therefore the sisters go on their fore-knowledge, and one of them tells you, if she had not known him before, she should not have known him then; she knows the man that abused her, she knows the man that insulted her, but not the man that wounded her; they have been more circumstantial than they were before. Gentlemen, I happened to use a term very much made use of in the profession, I called it *bolstering* up of evidence; I do repeat it again; let it give what offence it will, they have found it convenient to bolster up the weak part; they have produced the brother, to prove nothing; they have produced Mrs. Neale, because she has done them no good; they produced her, in order to bolster it up, by a number of evidences, to bring out such matter as was not brought out before; they chuse to bolster it, and I will repeat it here in and out of Court. Gentlemen, on the former trial I must make an observation; when the Miss Porters told their story there, they did not say one single syllable that, when they got into the house, they mentioned the man to their father, mother, or brother; only that they were wounded by some man or other; to-day they begin and produce the same people, and they themselves get out of them what they know would have been extorted from them in private conversation; therefore I repeat, they are brought to bolster up the weak parts of the former trial. With respect to the number of times that they say they saw the man, I do confess that they saw some man extremely like the prisoner. If there is any one fact that can strengthen the case, that at times a man like the prisoner, and at other times some man, would stop them, and use words the most dreadful; that a man should at one time be so wanton, so savage, lay aside his humanity, and that at another time he should pass on, and not speak to them; this is extraordinary, and I am not disposed to believe it; however, that some man has insulted them in this manner, in their various walks, I do believe. Gentlemen, with respect to the point of identity, there was a particular case, I forget the very year, where a very worthy gentleman, Sir Thomas Davenport, was robbed somewhere in the vicinity of London; he, his wife, his coachman and footman, and I do not know how many more, swore in a very formal manner to two men; Sir Thomas went so far as to swear to the horse; Lady Davenport would not swear to the horse; I think there were thirty as respectable people as Sir

Thomas himself, who proved an *alibi*, and the men were both honourably acquitted; and yet it was admitted, on all hands, that Sir Thomas swore with the utmost purity of mind; and so the mistake is here; I say it is no impeachment of her veracity, when I say that Sir Thomas himself was mistaken; I only mention this to shew, that though the witnesses speak positively as they have thought, yet that they may be deceived. Gentlemen, the learned Gentleman has been long versed in the school of Eloquence; I have been a retired man; I took up this cause with the feelings of a man; the learned Gentleman can wind round you; he knows all the roads to your hearts; he can talk of a fine family, to work on your feelings; I do not possess those powers; I must tell you, in direct terms, that from my soul I most sincerely believe the prisoner innocent. Gentlemen, I could tell you of a lady that has been most barbarously and cruelly wounded; I was with her at the moment it happened, on the 20th of August; and a most cruel business it was; and I am sorry to say that was the seventh time she had been assaulted since Williams was committed. I could not get the lady here to-day; her father-in-law is a very old man, and he is dangerously ill, but I hope you will give credit to the fact; if not, I will be sworn to the truth of it; however, if it should appear that women have received frequent and dangerous wounds in these parts; if it should appear, that the very man who wounded this lady, answers the exact description that Miss Porter gave at Bow-street, and used the exact language of Oh, Oh! and stared her in the face, and stooped at her, I think it will have some influence upon you. Gentlemen, I trust, as the dignity of human nature is at stake, and as a poor helpless man stands here unbefriended, humanity will step forth: if the learned gentlemen deny me that justice here, I must say before-hand, they are afraid to meet the question.

He then produced the same witnesses to the *alibi* as were examined on the former Trial; after which the Chairman summed up the case, recapitulating the whole evidence very minutely, with many pertinent observations, conjuring the Jury, for God's sake, to divest themselves of all prejudice; and the Jury retired for half an hour, doubting only whether they should find the prisoner guilty of an assault with an intent to murder, or only of a common assault, when they returned with a verdict,

GUILTY of the whole indictment.

On the following day he was indicted for a similar assault on Elizabeth, the wife of Thomas Davis.

Elizabeth Davis sworn.

(Examined by Mr. Shepherd.)

I am the wife of Thomas Davis. In May last, I lived in Clarke's-Court, Holborn, very near Little-Turnstile: I was coming up Holborn, last May, the 5th, between nine and ten in the evening: a man spoke to me; the first word he said, was, Where are you going? I did not immediately answer him; he met me, and turned back with me; I did not know he spoke to me; he said again, Where are you going? I said, Home; he said, Where is your home? I said, Not far; he said no more to me for some time; he continued walking a little before me, and sometimes a little behind, from the top of Chancery-lane, to near the Bull and Gate; he then accosted me with a nosegay he had in his hand, and said, Are not these very pretty flowers? to the best of my recollection; but I cannot say to this last word; it was a largish nosegay; I said, Yes, Sir; I did not take particular notice of the flowers; he put it to my nose, but I did not let it touch me.

Q. Had you an opportunity of observing his face and his person?

A. I took particular notice of him every time he spoke to me; I looked at him when he spoke to me; he then said, Will you smell at them? And I said, No, I thank you, Sir, I am not partial to flowers; and I did not think they were natural flowers, but I did not say what I thought.

Q. Did it occur to you at the time that he had the nosegay in his hand, that they were not natural flowers?

A. Yes, it did; after that, he directly caught me by the throat, and with his other hand he gave me a blow across the thigh; and at that time I heard my clothes rent.

Q. Did you feel the wound at that moment?

A. No, Sir; I pushed his hand from my throat, and he struck me a blow on my breast; I cried out, to the best of my knowledge, Murder! I cannot tell what became of him; he went on, and I turned up my own court, I was so near my own home; there is but one house between the yard and the court; I knocked at the door, and they let me in; I first saw my landlady, Sarah Garrison; I was so much alarmed, I was not sensible; I did not know what I said; I fell into a fit, and was laid on my landlady's bed.

Q. Do you recollect what coat this man had on?

A. T.

A. To the best of my knowledge (it was candle light) it was a light coat, with buttons of the same; it appeared to have a lappel, with buttons on the breast.

Q. Had you an opportunity of seeing his face at the different times he spoke to you?

A. Yes, a great opportunity, because all the shops were open.

Q. Turn round, and see if you can see the same man again?

A. Yes, that is the man.

Q. Have you the least doubt?

A. Not the least in the world. I went to Bow-street; my landlady was with me; I saw him in the yard among a great number of other persons; and I said to Mrs. Garrison, That is the man that cut me.

Q. Had you any body to point him out to you, except your own recollection of his person?

A. No, Sir; there was no person there to say any thing to me; and as soon as I came out of the house into the yard, I saw him, and singled him out directly; he was dressed in buff and blue.

Q. Had you ever been taken to Bow-street by other people?

A. No, never.

Q. Do look at him again, and tell the Jury whether you have any doubt at all of that being the same man that struck you?

A. No; I have no doubt of the features of his face; his hair was dressed with powder at that time.

Q. Have you received any reward for giving this evidence, of any sort?

A. No, not one single farthing, nor any promise of any from any body.

Court. How long after that did you see him?

A. When he was at Bow-street, the 4th of June; I never saw him before to my knowledge.

Sarah Garrison sworn.

I keep the house where this poor woman lodges; I remember her coming home on the 5th of May; she hallooed aloud in the court; I did not know her voice; I thought it was a common prostitute; I did not open the door directly; she knocked twice before I opened it; and when I opened it, I asked her what was the matter? She did not answer me any farther, than she said, *Oh, the man! the man!* I shut the door, and she dropped down in a fit; I went with her afterwards to Bow-street; and she went into the yard and pitched

pitched on the prisoner; there were a great many people in the yard; I thought it was a gentleman that was walking under the Piazzas; she said, no; it was a gentleman in blue, with a buff waistcoat; I never saw the prisoner before; she said she did not think the flowers were natural.

Q. Did you see the wound on this poor woman?

A. Yes; she was ill about nine days.

Q. Was it a cut with a sharp instrument?

A. It was like a scar; but the blood was within the scar; no blood besides; it seemed to be a small instrument; the clothes were cut all through at the same part as the wound was.

Patrick Macmanus sworn.

Q. Did you go at any time to N^o 52, in Jermyn-street?

A. Yes.

Q. Did you find any clothes there?

A. Yes; that is the house where the prisoner's mother lived; I went there after I had been to his lodgings; he lived at the George ale-house, in Bury-street; I found this coat at his mother's, a light-coloured lappelled coat, with buttons of the same; the prisoner said it was his coat; he did not deny it at all.

Court. Did you ever describe the drefs?

A. Yes, to Mr. Angerstein, at the house, before the prisoner was taken.

Julius Angerstein, Esq. sworn.

I saw this poor woman, I believe, a day or two after this happened; she came very ill to my house; she described the coat to be a light-coloured coat; I do not recollect the circumstance of the lappels; I was not well myself at the time; I took particular notice of it, as it was different from the other description.

Q. Did you hear her say any thing of the buttons?

A. No, Sir; the first description I had of the *Monster*, was a blue coat; and she differed in the colour of the coat so much, that I took notice of it in another advertisement.

The prisoner was going to enter on his defence; but Mr. Swift said, Not a word, Mr. Williams; you was prevented from speaking last night, and you shall not be permitted to speak to-day.

Prisoner. I shall take the advice of the Gentleman, my Counsel.

Mr. Chairman. Gentlemen of the Jury, I must say, that I never saw either in this, or any other Court of Justice.

Jury conduct themselves with more impartiality, more

ness, more fairness, more deliberation, and more propriety, than you did yesterday; you have done yourselves great honour: you have done your country great service. I am now, Gentlemen, to call upon you, and endeavour to impose upon you a still harder task; that you would endeavour, if possible, to forget every thing that passed even yesterday; and to treat this as a new offence; and to treat the prisoner, in your judgment upon him, as if you had never heard of him before, but that he was now, for the first time, brought before you, charged with an assault, proved only by one witness, but with certain corroborating circumstances. Here the Chairman summed up the evidence; and the Jury immediately found the prisoner

GUILTY

The prisoner was then tried upon a third indictment for a similar assault on Elizabeth Baughan, spinster, on the 6th of December 1789.

Elizabeth Baughan sworn.

I remember being with my sister Frances on Westminster-bridge, on the 6th of December, 1789, about a quarter past seven at night; I was coming towards Parliament-street; I observed a man following us pretty close in Bridge-street; he kept grumbling in a low tone; I could not hear what he said; he came to the side of me, and walked almost to the end of Bridge-street; I saw him very clearly; he endeavoured to push himself between my sister and the rails; he hit my sister about the small of her back, and then he struck me just at the small of my back; he struck me only once; my clothes were cut to pieces, and a streak on my back; it must have been with some sharp instrument; I saw the prisoner at Sir Sampson's, and pointed him out immediately among others, by my recollection of his person, and by nothing else.

Q. Look at him now?

A. That is the person.

Q. Have you any doubt?

A. Not the least; I went to see some other persons at Bow-street, but they were not the right persons. (*A blue silk gown produced.*) It is cut about half a yard; it was folded up round me; I did not hear it rent at the time; the rest of my clothes were cut, and I am positive they were not cut before, and the scratch corresponded with the cutting of the gown.

Frances

Frances Baughan sworn.

I was in Bridge-street with my sister. I heard the prisoner say (with his mouth close to my ear) Blast you, is it you? he swore bitterly all the way. The blow on my back threw me forward, and I turned round and observed him strike my sister, and he kneeled nearly on one knee when he struck my sister, which was with great violence, and he swore at the time; I saw his face very plain, but not at first; and it came to my recollection, that I thought I had seen him, and knew his voice before; I did not know him so much by seeing him that night, as two years before, when he insulted me from the King's Palace to May's-Buildings, and never from that time did I forget him; he insulted me very grossly, insomuch that I slapped his face in the Park; I cannot positively say it was the same man; but I think it was from his voice and person.

Q. Look at him now?

A. I do not forget him.

GUILTY

The prisoner made no defence.

Mr. Fielding said, there was an indictment against the prisoner, for an assault on Miss Sarah Porter; but he was instructed to say, the family did not mean to prosecute him farther. There were several other indictments against him; but the ends of public justice being answered, for which alone these prosecutions were set on foot, he would not go on with them.

The Chairman then passed Judgement on the Prisoner.

Renwick Williams, you have been indicted for an assault on Ann Porter; you have been tried and found guilty, by a cool, impartial, dispassionate, and deliberating Jury, much to the satisfaction of the Court, and much to their honour; for I must again say, that I never saw a Jury conduct themselves with more propriety in all the experience I have had of Courts of Justice; they seemed to have divested themselves of all prejudice, and to be unconnected with the general mass of people. The sentence of the Court on you, therefore, is, That for the assault on Ann Porter, you be imprisoned in Newgate for the space of *Two Years*. For the assault on Elizabeth Davis, that you be imprisoned *Two Years*, to commence from the expiration of the former sentence; and that, for the assault on Elizabeth Baughan, you be imprisoned *Two Years*, to commence from the expiration of the former four; and at the end of the *Six Years*, you find security for your good behaviour for *Seven Years*, yourself in the sum of Two Hundred Pounds, and two sureties in One Hundred Pounds each.

STATUTE

STATUTES passed in the present Session of
PARLIAMENT, holden 25th November, 1790.

A N A C T

For granting to His Majesty an Additional Duty on Malt.

Be it enacted, That from and after the 5th day of January, 1791, there shall be raised, levied, collected, paid, and satisfied, unto and for the use of His Majesty, his heirs and successors, for and upon all malt, the rates, duties, and malt impositions herein-after mentioned; (that is to say,)

Upon every bushel of malt which shall be made of barley, or any other corn, in England, Wales, and the Town of Berwick upon Tweed, by any person or persons whomsoever, whether the same shall be or not be for sale, the sum of three-pence, and so proportionably for any greater or less quantity, to be paid by the maker or makers thereof respectively, over and above all other duties and impositions that may be payable for the same:

And for and upon every bushel of malt which shall be made in Scotland by any person or persons whomsoever, whether the same shall be or not be for sale, the sum of one penny halfpenny, and so proportionably for any greater or less quantity, to be paid by the maker or makers thereof respectively, over and above all other rates, duties, and impositions that may be payable for the same:

And for and upon every bushel of malt which, at any time or times, shall be brought from Scotland into England, Wales, or the Town of Berwick upon Tweed, the sum of one penny halfpenny, and so proportionably for any greater or less quantity, over and above the duty herein-before granted upon malt made in Scotland, and all other duties and impositions, that may be payable for the same.

And be it further enacted, That there shall also be paid and satisfied for the use of His Majesty, for and upon every bushel of malt, whether ground or unground, made of barley or of any other corn or grain, belonging to any malt-

ster or maker of malt for sale, seller or retailer of malt, brewer, distiller, innkeeper, victualler, or vinegar-maker, either in his, her, or their custody or possession, or in the custody or possession of any other person or persons whatever in trust for him, her, or them, or for his, her, or their use, benefit, or account, upon the said 5th day of January, 1791, the sum of three-pence, in that part of England, Wales, and the Town of Berwick upon Tweed; and the sum of one penny halfpenny in Scotland; and so proportionably for any greater or less quantity, to be paid by the person or persons respectively possessed of such malt, over and above all other rates, duties, and impositions, charged or chargeable thereupon, or that may be payable for the same: provided always, that the said additional duty, hereby directed to be imposed, raised, and satisfied to His Majesty on the said malt which shall be in the possession of any such persons as are herein-before described, on the said 5th day of January, 1791, shall be collected and paid in manner following: (that is to say), one third part thereof on the 5th day of February, 1791; one third part thereof on the 5th day of March, 1791; and the remaining one third part thereof on the 5 day of April, 1791.

And be it further enacted, That such of the duties, by this Act imposed, as shall arise in England, Wales, and the Town of Berwick upon Tweed, shall be under the management of the Commissioners of Excise in England for the time being; and such thereof as shall arise in Scotland, shall be under the management of the Commissioners of Excise in Scotland for the time being.

And whereas several maltsters, who have sold or contracted for the sale of malt, may not have delivered the same to the buyers thereof before the said 5th day of January, 1791, and it is reasonable that such buyers should reimburse to the said maltsters all such money as they shall have paid for the duty charged thereon by virtue of this Act; be it therefore enacted by the authority afore said, That in all cases where any person shall have sold or contracted for the sale of any malt, and shall not have delivered the same to the buyer or person who shall have contracted for the purchase thereof, before the said 5th day of January, 1791, every such sale and contract shall, and is hereby declared to be as valid and effectual as if this Act had not been made; and the buyer or person who shall have contracted for the purchase of any such malt, shall, and is hereby required, at the time of the delivery thereof, to pay to the person who shall have sold or contracted for the sale of such malt

and above the price agreed to be given for the same) all such money as shall have been charged for the duty thereon by virtue of this A&.

And be it further enacted by the authority aforesaid, That all and every the powers, authorities, directions, rules, methods, exemptions, deductions, bounties, penalties, and forfeitures, clauses, matters and things, which in and by an A& made in the 33d year of the reign of his late Majesty King George the Second, (intituled, "An A& for granting to His Majesty several Duties upon Malt; and for raising the Sum of Eight Millions by way of Annuities, and a Lottery, to be charged on the said Duties; and to prevent the fraudulent obtaining of Allowances in the gauging of Corn making into Malt; and for making forth Duplicates of Exchequer Bills, Tickets, Certificates, Receipts, Annuity Orders, and other Orders, lost, burnt, or otherwise destroyed;") or as are contained in any other A& or A&ts of Parliament in the said A& mentioned, or referred unto, or any of them, are provided, settled, established, prescribed, or directed, for managing, ascertaining, securing, raising, collecting, levying, recovering, paying, allowing, repaying, adjusting, and settling the duties thereby granted, or to the payment of rents payable in malt, or according to the price of malt, other than in such cases for which other directions are prescribed by this A&, or any other A& or A&ts of Parliament, shall be exercised, practised, applied, used, and put in execution, in and for the managing, ascertaining, securing, raising, collecting, levying, recovering, paying, allowing, repaying, adjudging, and settling the several and respective rates, duties, and impositions by this A& granted upon malt, as fully and effectually, to all intents and purposes, as if all and every the said powers, authorities, directions, rules, methods, exemptions, deductions, bounties, penalties and forfeitures, clauses, matters, and things, were particularly repeated, and again enacted, in the body of this present A&.

And, for the better encouragement of common brewers and makers of beer or ale for sale, and to the end that no such brewer or maker of beer or ale may be under the necessity to take any more in the price thereof, upon the retail of the same, than according to the usual rates and prices; be it enacted, That, from and after the said 5th day of January, 1791, there shall be paid and allowed out of the monies to arise by the said duties on malt, to every common brewer, or other person or persons who brew beer

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case, the said Collector shall, out of the monies arising from the duties by this Act imposed upon malt, forthwith pay to the person producing the said certificate, for every barrel of beer or ale mentioned within, the respective allowances by this Act in such case directed to be made; and in case the said Collector shall not have sufficient money in his hands, arising by the duty by this Act imposed upon malt, to pay the same, then the respective Commissioners for the said duty are hereby required to pay the said allowances out of the said duty upon malt arising by this Act; and if at any time it shall happen, that the said respective Commissioners shall not have in their hands monies arising by the said duty sufficient to pay the said allowances, then, and in every such case, the said respective Commissioners shall pay the said allowances out of any monies then in their hands.

And be it further enacted by the authority aforesaid, That all and every the powers, authorities, directions, rules, methods, penalties, and forfeitures, clauses, matters, and things, which, in and by an Act made 12 Ch. II. cap. 24; or by any other law now in force relating to His Majesty's revenue of excise upon beer, ale, or other liquors, are provided, settled or established, for securing, enforcing, managing, raising, levying, collecting, paying, mitigating, or recovering, adjudging, or ascertaining the duties or penalties thereby granted, and for preventing, detecting, and punishing frauds relating thereto, (other than in such cases for which other penalties or provisions are prescribed by this Act), shall be exercised, practised, applied, used, and put in execution, in and for the managing, raising, levying, collecting, mitigating, adjudging, ascertaining, recovering, and paying the several duties hereby granted, as fully and effectually, to all intents and purposes, as if all and every the said powers, authorities, rules, directions, methods, penalties, forfeitures, clauses, matters and things, were particularly repeated and again enacted in the body of this present Act.

A N A C T

For granting to His Majesty additional Duties on the Amount of the Duties under the Management of the Commissioners for the Affairs of Taxes therein mentioned.

Be it enacted, That, from and after the 5th day of April, 1791, there shall be raised, levied, collected, and paid, unto and for the use of His Majesty, throughout the kingdom of Great Britain, upon every assessment to be made after the 5th day of April, 1791, under or by virtue of any Act or Acts of Parliament now in force, for or in respect of the several rates and duties under the management of the Commissioners for the Affairs of Taxes, an additional rate or duty after the rate of ten pounds *per cent.* upon the gross amount of all the said former rates and duties charged by such assessment, except as herein after is excepted.

And be it further enacted, That there shall be raised, levied, collected, and paid, unto and for the use of His Majesty, upon every assessment made or to be made for the year ending the 5th day of April, 1791, under or by virtue of any Act or Acts of Parliament now in force, for or in respect of the rates and duties before mentioned, an additional rate or duty after the rate of ten pounds *per cent.* upon the gross amount of all the said former rates and duties charged by such assessment, except as herein-after is excepted, to be computed for the half year ending the said 5th day of April 1791.

Provided always, and be it further enacted, That nothing in this Act contained shall extend, or be construed to extend, to charge with the said additional rate or duty of ten pounds *per cent.* the amount of the duty commonly called The Land Tax, granted to His Majesty in and by an Act of the last Session of Parliament, (intituled, "An Act for granting and Aid to His Majesty by a Land-Tax, to be raised in Great Britain, for the Service of the Year 1790)," or granted, or to be granted, by any Act of the present Session of Parliament, for the service of the year 1791, or that shall or may be granted by any Act or Acts of Parliament during the continuance of this Act; nor the amount of the rates and duties on all inhabited houses, granted by an
Act.

A& of the 24th year of the reign of his present Majesty, (intituled, "An A& for repealing the several Duties on " Tea, and for granting to His Majesty other Duties in lieu " thereof; and also several Duties on inhabited Houses; " and upon the Importation of Cocoa Nuts and coffee; and " for repealing the Inland Duties of Excise thereon)," any thing herein-before contained to the contrary thereof in and wife notwithstanding.

And be it further enacted, That the said additional rates and duties hereby imposed as aforesaid, shall be paid over and above, and in addition to, the respective rates and duties on houses, windows, and lights, granted by an A& of the 6th year of the reign of his present Majesty; upon inhabited houses, granted by an A& of the 19th year of the reign of His Majesty; upon waggons, wains, carts, and other carriages, granted by an A& of the 23d year of the reign of his said Majesty; upon horses, granted by two several A&s of the 24th and 29th years of the reign of his said Majesty; upon male and female servants, granted by an A& of the 25th year of the reign of his said Majesty; and upon coaches and other carriages, granted by two several A&s of the 25th and 29th years of the reign of his said Majesty.

And be it further enacted, That the Commissioners authorized or appointed, or who shall be authorized or appointed, to put in execution the said several A&s before-mentioned, relative to the said former rates or duties, or any of them, on the amount of which the said additional rates or duties are hereby imposed, shall be Commissioners for executing this present A&: and that the several Receivers General appointed, or who shall be appointed, to receive the said former rates and duties, to be assessed and collected under or by virtue of the said A&s, shall, without any new commission or commissions, or any further security to be had, obtained, or given, by Receivers General of the said additional rates or duties hereby imposed within their respective districts or collections; and that the several Surveyors, Inspectors, Assessors, and Collectors, respectively appointed, or to be appointed, to put in execution the said several A&s before-mentioned, or any of them, shall be Surveyors, Inspectors, Assessors, and Collectors, to put in execution this present A&, according to the respective power and authorities given to them by the said former A&s, or any of them; and the said Commissioners, Receivers General, and other the persons aforesaid, being duly qualified

to act in the execution of the said several Acts before-mentioned, relative to the said former rates or duties, or any of them, shall, and they are hereby respectively empowered and required to do all things necessary for putting this Act in execution with relation to the said additional rates or duties hereby imposed, in the like, and in as full and ample a manner as they, or any of them, are or is authorized to put in execution the said former Acts relative to the said rates and duties, or any matters or things therein respectively contained.

And be it further enacted, That the said additional rate or duty hereby imposed for the said half year, ending on the 5th day of April, 1791, shall be paid at the times and in the manner following; (that is to say), on the 5th day of January, and the fifth day of April, 1791, by even and equal portions; and shall, from and after the passing of this Act, be a charge upon the respective persons assessed to the payment of any of the said former rates and duties for the year ending the 5th day of April, 1791, and shall be paid by such persons respectively at the times before mentioned; and the respective Collectors, to whom any assessments for the year ending the said 5th day of April, 1791, shall be delivered for the purpose of collecting the former rates or duties according to the directions of the several Acts before mentioned, shall have full power and authority to demand, collect, and receive, the said additional rate or duty hereby imposed, for the said half year, of and from the persons respectively charged with the said former rates and duties in addition thereto, and at the times and in the manner herein before mentioned, without any new assessment to be made for the same, and to give acquittances for the said rate or duty received, in such manner as is directed by the said Acts with relation to the said former rates and duties.

And be it further enacted, That the several and respective Collectors of the said former rates and duties, to whom any assessments thereof for the year ending the said 5th day of April, 1791, shall be delivered, shall, on or before the 5th day of March, 1791, estimate and ascertain, according to the best of their skill and judgment, the amount of the rate or duty by this Act imposed upon every such assessment, and shall, by writing under their respective hands, certify the same to one or more of the said Commissioners, acting for the respective division or place in which such assessments shall be made, together with the names of the several persons chargeable therewith, and the amount

amount of the said former rates and duties whereon such additional rate or duty is by this act imposed; and shall also cause two duplicates thereof to be made out and delivered to the said Commissioner or Commissioners in each division or place, all which certificates and duplicates thereof respectively shall be signed by such Commissioner or Commissioners; and the said duplicates shall be forthwith transmitted to such persons, and in such and the like manner, as is directed by the said acts relative to the said former rates or duties, or any of them, with respect to the duplicates of assessments therein mentioned.

And be it further enacted, That the respective Surveyors or Inspectors appointed, or to be appointed, under or by virtue of the said several acts relative to the said former rates and duties, or any of them, shall be, and are hereby respectively empowered and required to inspect and examine the certificates to be made of the said additional rate or duty for the said half year, ending the said 5th day of April, 1791, before the Commissioner or Commissioners shall have signed the same, and to alter and amend any such certificate or certificates, if they, or any of them, shall see just cause for so doing; and every person, in whose custody such certificate shall be, is hereby required, upon the request of any such Surveyor or Inspector as aforesaid, to produce the same for inspection for the purpose aforesaid.

And be it further enacted, That, from and after the said 5th day of April, 1791, the said additional rate or duty hereby imposed shall be paid quarterly in each year, on the four most usual days of payment in the year for the said duties: (that is to say), on the 5th day of January, the 5th day of April, the 5th day of July, and the 10th day of October, in every year, by even and equal portions, the first payment thereof to be made on the 5th day of July, 1791; and upon every assessment to be made after the said 5th day of April, 1791, under or by virtue of the said acts, or either of them, the Assessors appointed or to be appointed to make such assessments, and in their default the respective Surveyors and Inspectors appointed or to be appointed in pursuance of the said several Acts before mentioned, or any of them, shall ascertain the amount of the said additional rate or duty hereby imposed, and shall certify and return the same upon such assessments to the respective Commissioners authorised to put the said Acts in execution, at their respective meetings to be held for returning such assessments in all and every the respective countries, shires, stewartries, ridings, cities,

cities, boroughs, cinque-ports, towns and places respectively; which said additional rate or duty, so certified, shall be added to the amount of the former assessed rates and duties, and shall be collected, raised, levied and received under the rules, regulations, and directions, prescribed by the said former Acts, subject nevertheless to such proportional increase or abatement in the amount thereof as shall be necessary in case the said former rates or duties so assessed shall be increased or diminished by any surcharge thereupon, or appeal therefrom, in pursuance of the said former Acts.

And be it further enacted, That the several additional rates or duties by this Act imposed upon the amount of the several former rates and duties as aforesaid, shall and may be respectively ascertained, managed, collected, paid, recovered, paid over, and accounted for, under such penalties, forfeitures, and disabilities, and according to such general rules, methods, and directions, by which all the former rates and duties, on the amount of which the said additional rates or duties are by this Act imposed, or according to such special rules, methods and directions, by which such of the former rates and duties, upon the amount of which any of the said additional rates or duties may be chargeable by virtue of this Act, were or might be ascertained, managed, collected, paid, recovered, paid over, and accounted for, except as far as any of the said rules, methods, and directions, are expressly varied by this Act; and all and every the powers, authorities, rules, directions, penalties, forfeitures, clauses, matters, and things, contained in any Act or Acts of Parliament relative to the said former rates or duties, or any of them now in force, and not hereby otherwise provided, for the computing, surcharging, recovering, paying and accounting for the said rates and duties by any former Acts granted, as far as the same are applicable to the additional rates or duties by this Act imposed, and not repugnant to the particular directions of this Act, shall be in full force, and be duly observed, practised, and put in execution, throughout the kingdom of Great-Britain, for computing, surcharging, recovering, paying, and accounting for the several additional rates and duties by this Act granted, as fully and effectually, to all intents and purposes, as if the same or the like powers, authorities, rules, directions, penalties, forfeitures, clauses, matters, and things, were particularly repeated and re-enacted in the body of this present Act.

And

And be it further enacted, That all monies arising by the said rates and duties (the necessary charges of raising and accounting for the same excepted), shall, from time to time, be paid into the receipt of his Majesty's Exchequer, distinctly and a part from all other branches of the public revenues; and that there shall be provided and kept in the office of the Auditor of the said receipt or Exchequer a book or books, in which all the monies arising from the said rates and duties, and paid into the said receipt as aforesaid, shall be entered separate and apart from all other monies paid and payable to his Majesty, his heirs and successors, upon any account whatever; and the said money so paid into the said receipt shall be subject and liable to the uses and purposes herein after mentioned.

And be it further enacted, That all the monies arising, or to arise, by the said several rates and duties hereby imposed, which shall be paid into the said receipt at any time or times on or before the 5th day of April 1792, shall be carried to and made part of the fund, called "The Consolidated Fund;" and that from and after the said 5th day of April, 1792, all the monies arising or to arise by the said rates and duties, and paid into the said receipt after the said 5th day of April 1792, shall, together with such other rates and duties as shall be granted by any Act or Acts of this present session of Parliament for this purpose, during the terms for which such rates and duties shall be respectively granted, be a fund for the payment and discharge of the several principal sums of 800,000*l.* and 1,033,000*l.* amounting to the sum of 1,833,000*l.* to be raised by Loans or Exchequer Bills, in pursuance of any Act of this session of Parliament, together with such interest as shall by the said Act be directed to be paid or made payable for the said principal sums of 800,000*l.* and 1,033,000*l.*; and shall be issued, applied, and disposed towards the paying off and discharging the said principal sums of 800,000*l.* and 1,033,000*l.* and interest to become due thereon as aforesaid, and to no other use, intent, or purpose whatsoever.

And be it further enacted, That upon payment of the said principal sums of 800,000*l.* and 1,033,000*l.* and all interest to become due thereon, or reserving at the said receipt of Exchequer so much money out of the said fund to be established as aforesaid as shall be sufficient to satisfy and discharge the said principal sums of 800,000*l.* and 1,033,000*l.* and all interest as aforesaid, and publication thereof, in the man-
ner

ner to be directed by the said Act of this session of Parliament, the said rates and duties hereby imposed shall from thenceforth cease and determine, and be no longer paid or payable; and all the rules and regulations of this act shall also from thenceforth cease and determine, except as to the recovery of any arrears of the said rates or duties which may at that time have accrued or grown due, or to any fine, penalty, or forfeiture, which may have been then incurred.

And whereas the inhabitants of many parishes or places have frequently suffered by the frauds and insolvency of their Collectors, by being subjected to re-assessments for monies embezzled by them; be it enacted and declared, That such persons as shall be nominated to be Collectors of the said former rates and duties shall, if required so to do, give good and sufficient security to any three or more of the Commissioners for carrying this Act into execution, equal to the amount of the whole rate to be collected in each district, for their duly paying to the Receiver General such monies as shall come to their hands, which security the said Commissioners, or any three or more of them, are hereby authorized and empowered to take; and on failure of the persons so named to be Collectors as before directed giving such security, if required, the said Commissioners, or any three or more of them, shall be at liberty, and are hereby authorized, to appoint any other two or more sufficient persons, who can give such security as aforesaid, residing within the limits and bounds of the parishes, townships, constablewicks, and places where they shall be chargeable, to be Collectors of the said former rates and duties.

Provided always, That if no persons can be found within the several parishes, townships, constablewicks, or places respectively, who are willing or able to give such security, then, and in such case, the persons who were first named by the Commissioners, as directed by the said Act, shall be Collectors of the said former rates and duties.

ADJUDGED

ADJUDGED CASES

IN the COURT OF KING'S BENCH, MICHAELMAS
TERM, 31 GEO. III.

REX v. the Inhabitants of CLAYHYDON.

Two Justices having removed William Taylor from Clayhydon to Usculm, the Sessions quashed the Order, and stated the following

C A S E.

The pauper, being settled at Usculm by hiring and service, made a bargain with W. Hodges, in Dunkeswell, for a year, at the wages of £2. 15s. Od. and served till nine days before the expiration of the year, when he went away on a *Sunday* morning, in order to get another place when his year should be up, without asking any leave of, or mentioning it to, his master; he returned on the *Tuesday* following about six o'clock in the morning, when he asked his master what work he should go about; the master told him he might go and serve the master he had worked for the day before. He saw his master about an hour afterwards, who then paid him his wages up to that time only. No conversation passed; he then went away, and did not afterwards return: *he wished to have stayed out the year, but his master would not let him.*

LORD KENYON, Ch. J.—It is now too late to say that a *constructive service*, pursuant to a hiring for a year, will not confer a settlement on the servant: though I very much doubt whether a greater certainty on this subject would not have been attained by attending strictly to the words of the Act of Parliament: however, in order to preserve an uniformity of decisions, we must adopt the construction which has so frequently been put upon it. But I do not know that it has ever been decided that a settlement was obtained, *unless by construction the relation between master and servant continued during the whole year.* The cases of *Rex v. Islip*, and *Rex*

Rex v. Maddington, which have been relied on, do not govern the present. In the former, the servant did not return until after the expiration of the year; and the facts of that case left the question open whether or not the relation between the parties subsisted during the whole year: the Court there thought that the master improperly refused his consent, and that though the servant were not in the actual discharge of his duty in his master's house, yet, as he was liable to be called into the master's service during the remainder of the year, that he was constructively in that service down to the end of the year. But the present case differs from that, because during the continuance of the year a further act was done; when the servant returned after his absence, the master not only found fault with him, but refused to take him again into his service: it is true that the servant wished to continue, but both parties did that which put an end to the contract; the one paid, and the other received the wages. After that period, the servant was no longer subject to the controul of the master. In *Rex v. Ibb*, the servant was under the master's control during the whole year; he was liable to be called into the master's service whenever the master thought proper: but here the relation between the master and servant was rescinded before the end of the year by the act of both parties; then it is impossible to say that the pauper was constructively in the service after that time. So in the case of *Rex v. Maddington*, though the servant left the service three weeks before the end of the year, and went to his friend, because he was not able to perform his service, yet there was no act done during the year to put an end to the contract: afterwards indeed when the master paid the servant his wages, he deducted a part of them; but he could not by an act *ex post facto* deprive the servant of the benefit to which he was before entitled. But the case of *Rex v. Gresham* is extremely like the present; there the Court held that, by the act of accepting the wages, the servant agreed to put an end to the contract. I am therefore of opinion that there could be no *constructive* service in this case, when the parties themselves, by mutual consent, put an end to the relation of master and servant within the year.

ASHHURST, J.—It is much to be lamented that the distinctions in these kind of cases have been so nice that it is difficult to discover the principles on which they have been decided. The question then is, What is the principle on which they have turned? I think that will be best supported in this case by determining that the service did not continue during

during the whole year. It is not now to be contended that an actual service is necessary, it must be admitted that a constructive one is sufficient. But this case is distinguishable from that of *Rex v. Islip*; for here was a dissolution of the contract before the end of the year; on the servant's return, the master insisted on discharging him, and offered his wages; and though the servant *wished* to continue in the service, yet he at length consented to put an end to the contract, by taking up those wages. The acceptance of wages was a signifying of the consent on his part. And this brings it within the case of *Rex v. Gresham*.

GROSE, J.—Though there has been some contrariety in the cases as to what shall be said to be a hiring for a year, yet it is clearly settled that, if during the year there be a dissolution of the contract, no settlement can be gained. Now on the facts of this case, it is clear that the contract was dissolved before the end of the year. The master refused to receive the pauper into his service when he returned, to which the latter made no objection, but received his wages up to that day only. It is indeed stated afterwards, that the servant *wished* to have served out the remainder of the year, but that his master would not let him; yet it is clear that at the time when the wages were paid, both parties consented to put an end to the contract; for it is stated that no conversation passed at that time; and though the servant may have wished to stay till the end of the year, yet he did not communicate that wish to his master. And the other fact stated, namely, that he accepted a sum short of the whole year's wages, shews that it was understood by both that they intended to dissolve the contract. This case is distinguishable from those of *Rex v. Islip*, and *Rex v. Maddington*, for the reasons already given; and it is like that of *Rex v. Gresham*.

Order of Sessions quashed.

JOHNSON v. BANN.

The plaintiff won 5*l.* of the defendant in a wager at a horse-race at Chester, where the stake for which the horses ran was less than 50*l.* which the defendant refusing to pay, this action was brought.

The question was, Whether (notwithstanding horse-races for small sums are prohibited by 13 Geo. II. cap. 19), this was not a legal wager according to the Case of *Good v. Elliot*, (vide our Mag. for October last, p. 108).

LORD KENYON.—It is sufficient, without adverting to cases, to say that the horse-race itself is prohibited by statute; and as the race which is the subject of the wager is illegal, so also is the wager.

Motion to set aside the non-suit refused.

REX v. *The Inhabitants of* YARPOLE.

Upon an appeal to the Sessions at Hereford against an order of removal by two Justices, the order was confirmed by eight Justices against seven; but it appearing that three of the *confirming* Justices were rated in the parish from whence the pauper was removed, they were objected to at the Sessions, but still persisted in voting.

It was now moved that the rule might be made absolute, upon the ground that Justices rated in either parish cannot vote upon an appeal.

LORD KENYON, Ch. J.—We cannot now make the rule absolute, as no judgment for quashing the original order was entered on the rolls of the Sessions. If the Court of Sessions had *quashed*, instead of confirming, the original order, there could have been no difficulty now. But the parties cannot come here *per saltum*; and, as no judgment for quashing the order of Justices was given at the Sessions, we, as a Court of Error, cannot do what the Court below should have done. We must make that part of the rule absolute, which has for its object the quashing of the order of Sessions, and direct the Justices below to enter a continuance to the next Sessions, when they may decide it.

HOBSON v. TODD.

This was an action tried at the Durham assizes against the defendant, for having surcharged the common; but the plaintiff was nonsuited, it being proved that he also had surcharged to a larger amount.

Upon an application now for a new trial, the same was granted, the Court delivering their opinion as follows.

BULLER, J.—It does not seem to me that the plaintiff has sustained any very serious injury: but the question here is, Whether or not the plaintiff be entitled to a verdict? The question relating to the damages is for the consideration of the Jury. It has been said by one of the counsel, that the plaintiff must prove a *serious injury*, relying on the words of Mr. J. Blackstone in the case cited. But the expression used by that Judge does not warrant such a construction; for it must be taken with a reference to the case then before him, in which the plaintiff did not appear to have been much injured, for it did not appear that he was possessed of a single beast which he could have put on the common. I lay therefore that part of the argument out of the question; for a *small injury* is so indefinite in its nature, that it affords no rule by which the mind can be guided. The only question then is, Whether *any* injury has been done by the defendant to the plaintiff? If the defendant had turned the supernumerary cattle on the common by the licence of the lord, I admit that the plaintiff could not have maintained this action, because the defendant would not have been a wrong-doer: but here is a wrong-doer, and the plaintiff is entitled to an action without proving any specific damage. This depends on the form of the declaration, and on what has been considered as proof of it. The allegation is, that the plaintiff could not by reason of the defendant's act enjoy his common in so ample and beneficial a manner as he used to do: now, if the defendant's supernumerary cattle had not been on the common, the plaintiff's cattle might have eaten every blade of grass which was consumed by the defendant's; that therefore is an injury to the plaintiff. There is also another ground on which this action may be supported, which is, that the *right* has been injured: and if a commoner cannot bring such an action as this, because his cattle

had grals enough to prevent them from starving, he must permit a wrong doer, like the defendant, to gain a right by the length of possession. This opinion is fortified by what fell from Lord C. J. *De Grey*, in the passage alluded to, who said that this action was introduced in lieu of the old writ of admeasurement of pasture. By that mode of proceeding if the defendant put more cattle on the common than he ought, the plaintiff was entitled to have a certain quantity admeasured to the defendant; the *excess* then is the injury in these cases. And the plaintiff having also surcharged makes no difference in this action; for one *tort* cannot be set off against another. Here the plaintiff has proved the whole of his declaration, by proving his right to the common, and that the defendant put on it more cattle than he had a right to do; and whether the plaintiff exceeded his right or not makes no part of the issue which the Jury were to try. The issue is, Whether the defendant has been guilty of any wrong, and whether the plaintiff has been injured by it in the smallest degree? and I am clearly of opinion that he has.

GROSE, J.—I am not inclined to encourage this action on any other ground than that mentioned by my brother *Buller*, namely, that, if *A.* infringe the right of common of *B.*, it is necessary that *B.* should have *A.*'s right ascertained; otherwise his wrongful act would in process of time become evidence of his right. If we were not to set aside this nonsuit it would be holding forth this doctrine to the Public; that if one commoner, who happened to surcharge in a small degree, were injured in his right of common, he could not maintain an action against another who surcharged to a much greater degree; but that might be productive of the most mischievous consequences to all those persons who have rights of common. But my opinion is, that it is no objection to a commoner, bringing such an action as this, that he himself has surcharged the common; though each person ought to recover damages in proportion to the injury which he receives. In practice I never recollect its being made a matter of inquiry, as an objection to the action, whether or not the plaintiff himself had surcharged; which, I take for granted, was because such an inquiry was immaterial. If this plaintiff has surcharged, he is liable to an action by any other commoner; but that is no objection to his suing the defendant, who is a wrong-doer; and it does not estop the plaintiff from shewing that he is injured. Therefore I am of opinion, that the rule for setting aside the

non-suit, and for granting a new trial, should be made absolute; though it is for the plaintiff's consideration, whether or not it be worth his while to proceed any further.

Rule absolute.

Rex v. PROSSER and others.

This was an appeal to the Sessions against a **Poor's Rate** in the borough of Leominster, where for election purposes several persons had been omitted to be inserted in the rate, upon which ground this appeal was made. The Sessions confirmed the rate, and stated the following

C A S E.

The counsel for the appellants (besides producing other evidence) offered to call the persons mentioned in the notice of appeal to prove that they were respectively possessed of rateable property within the borough at the time for which the rate was made, and have ever since been in the possession thereof. Those several persons tendered their votes at the last election of members to serve in parliament for the borough of Leominster, in respect and as the occupiers of the property for which the counsel for the appellants now contended that they ought to have been rated; the right of election for members to serve in parliament for the borough being, by the last determination of the House of Commons, in the bailiffs, capital burgesses, and inhabitants, of the borough, paying scot and lot. And those several persons, subsequent to the last Easter Sessions, (which were the Sessions next after the making and publishing of the rate in question, and prior to the present Sessions), having given notices of appeal against the rate now in question, complaining of their having been omitted to be rated in the rate for the said property respectively, and having entered appeals at the present Sessions with the proper officer, but which appeals were not received by the court of Sessions, the same not having been lodged at the last Easter Sessions, the counsel for the respondents objected to the testimony of such persons as incompetent; and the question having been argued by the

Counsel on both sides, the Court of Sessions are of opinion that such testimony is incompetent, and that the same shall not be received. The Counsel for the appellants having also called one Gabriel Weaver, to prove that W. Weaver, one of the persons so mentioned in the notice, was at the time of making the rate, and also for the time for which the same was made, and still is, possessed of rateable property within the borough, the Counsel for the respondents proposed by examination on the *voir dire* to shew that G. Weaver, who is not rated in the rate, was possessed of rateable property at the time of making the rate, and at the time for which it was made, and was on that account an incompetent witness; and the counsel for the appellants having objected to such inquiry into the fact of G. Weaver's being so possessed &c. as incompetent to the respondents in that case, the Court on hearing the Counsel on both sides over-ruled such last-mentioned objection; and it appearing by evidence that G. Weaver is possessed of property in the borough, equal in value to what other occupiers in the borough are rated in respect of, the Court of Sessions are of opinion that he is not a competent witness.

LORD KENYON, Ch. J. I purposely avoid saying any thing upon the first question (namely, whether the Evidence of the persons first mentioned was properly rejected, as the order of Sessions, so obtained, would have been Evidence before the House of Commons to prove the witnesses right of voting), as it is not necessary for the decision of this case. But, on the second, if I were aware of any possible interest which the witness G. Weaver had, I should hesitate before I held that his testimony was improperly rejected. The poor rates are made for a short space of time only; they are adapted to the situation of the parish at the time they are made; and persons who are liable to be rated one month may not be so in the next. The rateability of one person cannot affect the rateability of another; and therefore whatever rateable property G. Weaver may have had in this parish yet, as his name was not inserted in the rate, his testimony was improperly rejected.

BULLER, J. I have often heard Lord Mansfield say that the question, whether the evidence be admissible or not, depends on the subject matter to which it is applied. Then consider the subject matter here; a number of persons, who insist on being rated, (not wishing to be exempt from paying the rates), called a witness who is not rated to prove that they have rateable property in the parish; and it is objected
that

that he is an incompetent witness to prove this fact, because he himself is liable to be rated: but supposing that the appellants succeed in having their names inserted in the rate, it does not follow that the witness ought to be rated; that question will remain untouched, and it must depend on the fact of his having rateable property within the parish. It has been argued that a person, who is liable to be rated only, is equally an incompetent witness as if he were actually rated: but there is a material difference between the two cases. It has been settled in so many cases at *Nisi Prius*, that the liability to be rated is no objection to his being called as a witness, that it is now considered as an established point. The first question on this subject arose before Mr. Baron Burland, at Salisbury, in an action on a penal statute, which gave part of the penalty to the parish; and a person being called as a witness to support the action, who was liable to be rated to the poor, it was objected that such liability rendered him incompetent; but that learned Judge said that as he was not rated, he had not an immediate interest at that time; and the witness was admitted. The same point has since been repeatedly ruled by different judges. The rule stated by one of the counsel, that the witness is to be totally indifferent at the time when he is examined, is not accurate: if such a rule were to prevail, every objection, which now goes to the *credit* of the witness only, would render him *incompetent*. That rule more properly applies to *jurors*, who are rejected on very slight grounds. I take the rule to be this, that, if the witness can derive no benefit from the cause then before the Court, he is competent.

GROSE, J. In many cases it is difficult to draw the line between competency and credit. But in this case there is no doubt: Here the question is, Whether G. Weaver had any interest in the appeal at the moment when he was called to be examined? It is said that he was interested, because when another rate is made he will be so: the answer is, that, if his name be inserted in the next rate, he will be interested, and consequently incompetent, but he had no interest on this rate to render him an incompetent witness.

Order of Sessions quashed.

BAGSHAW *against* BOSLEY, Clerk.

The plaintiff being patron of the curacy of the Free Chapel of Wormhill, in the county of Derby, then vacant, nominated and appointed the defendant to be curate of the said chapel, and he was licensed thereto by the proper ordinary. Whereupon the defendant gave a bond to the plaintiff, binding himself to be constantly and duly resident at the curacy-house, and in default of such residence to resign and deliver up the said curacy and chapel into the hands of the proper ordinary, within one month next after the request of the plaintiff, or within one month next after notice in writing given to him, or left for him for that purpose at the curacy-house, so that the said curacy and chapel might become vacant, and the patron of the said chapel might present there-to anew. The bond further declared, that if the obligor did and should, in default of such constant and due residence in and upon the curacy-house, within one month next after the request of the said obligee, or within one month next after notice in writing given to him or left for him, for that purpose, at the curacy-house, absolutely resign and deliver up the said curacy into the hands of the proper ordinary and guardian of the spiritualities for the time being, absolutely to accept of such resignation of the said curacy, whereby the said chapel might become vacant, and the patron of the said chapel might present a-new to the said curacy and chapel; discharged of all charges and incumbrances, done or suffered by the obligor; and if the obligor did not or should not commit or suffer any waste or dilapidations upon the houses or lands belonging to the said curacy, during the time he should be so curate of the said curacy or chapel, the obligation should be void.

This was an action brought upon the bond for non-performance of the condition, and it was contended, 1st, that the bond was illegal, as placing the incumbent under undue controul; and, 2dly, that after the presentation the plaintiff gave the defendant a general licence to reside elsewhere, *which could not be revoked.*

LORD KENYON, Ch. J.—I cannot bring myself to entertain a doubt on this case. It has been argued that the patron's right of presentation is a mere trust; it is so to some purposes, but not to all. It is a trust coupled with an interest; for it is a subject of conveyance for a valuable consideration,

sideration, which is not the case with a naked trust. As soon as the defendant was presented to the living, he was bound to take upon himself all the duties of an incumbent; to reside on the living, to take upon him the cure of souls, and to keep the house in proper repair. Now this bond was only entered into for the purpose of securing a performance of all those duties, which by law, and without the bond, he was bound to discharge. I avoid saying any thing respecting the case of the *Bishop of London v. Piffke*: when that question comes again before the House of Lords, they will, I have no doubt, review the former decision, if it should become necessary. It is sufficient for me, in deciding the present case, to say that it cannot be governed by that. For here the plaintiff does not call for the resignation of the incumbent, but merely for a performance of those duties which in Morality, Religion, and Law, he ought to do. I am therefore clearly of opinion, that a bond for the performance of these duties is not illegal. With respect to the second question, it cannot be disputed but that, in general, the same person, who gives, may revoke, a licence. In the case cited indeed where the lessor had given his tenant licence to assign, such licence could not in its nature be revoked: but, in a case like the present, while the licence continues to exist and to have operation, it may be revoked; and in this respect this is like a general licence to enter another's grounds, which may be revoked at any time at the pleasure of the party who granted it.

BULLER, J.—I cannot find any immorality or illegality in this bond. It is the duty of an incumbent to reside on his living, and to be regular in the discharge of his duty. Now this bond requires nothing more; it only requires him to do what the law would have compelled him to do without it. As to the other point; the case cited from *Cro. Eliz.* 815, does not apply to the present. There the licence to assign having been once given, there was an end of the proviso: but here the condition is not, that the defendant shall not be absent without consent, but that he shall not be absent, and if he be and do not return after a month's notice, that he shall resign. Then the consent to be absent for a time does not vary the case; for the defendant was bound to return after a month's notice.

GROSE, J. declared himself of the same opinion.

Judgment for the plaintiff.

CROWN CASES.

DONNALLY'S CASE.

At the Old Bailey in February Session, 1779, *James, ALIAS Patrick Donnally*, was tried before Mr. Justice *Bullet*, and found guilty of having committed two several highway robberies upon the person of the Hon. Charles Fielding, son of the Earl of Denbigh. But the judgment was respited, and the following case submitted to the opinion of the JUDGES.

C A S E.

On the 18th of January, 1779, the prosecutor, Mr. Charles Fielding, dined at Mrs. Cotton's in Harley-street, Cavendish-square. As he was returning through Soho-square towards the Play-house between the hours of six and seven o'clock in the evening, he met the prisoner, whom he had never seen before. The prisoner desired that Mr. Fielding would give him a present. Mr. Fielding asked, "For what?" The prisoner answered, "*You had better comply, or I will take you before a Magistrate, and accuse you of an attempt to commit an unnatural crime.*"

Mr. Fielding then gave him half a guinea, which the prisoner said was not sufficient; but Mr. Fielding had no more in his pocket. On the 20th of January, about four o'clock in the evening, Mr. Fielding met the prisoner again in Oxford-street, who made use of the same threats as before; said Mr. Fielding knew what passed in Soho-square; and, unless he would give him more money, he would take him before a Magistrate and accuse him of the same attempt, and that it would go hard against him unless he could prove an *alibi*. Mr. Fielding then went to the shop of Mr. Walter, a grocer in Old-Bond-Street. The prisoner followed him, and staid on the outside of the door. When Mr. Fielding went into the shop, he took a guinea out of his pocket, gave it to Mr. Walter, and desired he would give it to the man at the door; which Mr. Fielding saw him do, and then the prisoner went away. Mr. Fielding said he was exceedingly alarmed at both the times, and under that alarm gave the money.

money. He was not aware what were the consequences of such a charge, and he apprehended it might cost him his life.

The Jury were desired to consider, *first*, Whether they were satisfied that Mr. Fielding delivered his money through fear, and under an apprehension that his life was in danger? *Secondly*, If they did not think that Mr. Fielding apprehended his life was in danger, whether the money was not obtained by means of the prisoner's threats, and against the will of Mr. Fielding?

The Jury found him guilty; and said they were satisfied that Mr. Fielding delivered his money through fear, and under an apprehension that his life was in danger.

The question is, Whether this amounts in law to a ROBBERY?

Signed, F. BULLER,

19th Feb. 1779.

On the 29th of April following, the TWELVE JUDGES assembled at L. Ch. Justice *De Grey's* house in Lincoln's-Inn-Fields, for the purpose of hearing Counsel upon this case. It was argued by Mr. *Howarth* for the Crown, and by Mr. *Graham* for the prisoner. The Counsel for the Crown spoke first, and afterwards replied to the arguments by the Counsel for the prisoner. The Counsel then withdrew, and the JUDGES debated the point among themselves, and then gave their several opinions, beginning with the junior Judge.

At the ensuing May Session at the Old Bailey, Mr. Justice *Willes* delivered the result of their deliberations to the following effect:

The question submitted to the JUDGES was, "Whether this offence amounts to a robbery?" This question has been argued by Counsel, both for the prisoner and for the Crown. The TWELVE JUDGES have investigated the subject, and delivered their sentiments *seriatim*; and they are unanimously of opinion, That the prisoner at the Bar is guilty of the crime of which he has been convicted.

The grounds and principles upon which this determination has been formed, I shall endeavour to state to the Court with equal brevity and perspicuity. ¶

The definition of robbery, as is given by Sir *William Staunford*, Sir *Matthew Hale*, and Mr. Serjeant *Hawkins*, is "a felonious and violent taking of any money or goods from the person of another, putting him in fear;" from which it is evident, that to constitute the crime of robbery, three ingredients are necessary: *first*, a felonious intention, or *animus furandi*: *secondly*, some degree of violence, or putting in fear: *thirdly*, a taking from the person of another.

But as the JUDGES declared, they did not mean to draw the exact line what should or what should not be construed a robbery, but that every case must depend on its own particular circumstances, it will be sufficient for me to shew that the facts proved in the present case, are within the definition of that offence.

First, The felonious intention, or *animus furandi*.

The prisoner, a stranger to Mr. Fielding, stops him in the street during the dusk of the evening, and desires "that he would give him a present;" and when he is asked, "For what?" he replies, "You had better comply, or I will take you before a Magistrate, and accuse you of an attempt to commit an unnatural crime." This conduct will not bear two constructions. It is clear that he laid in the way for the purpose of obtaining money, against the will of Mr. Fielding; and wherever one man obtains property from the possession of another *against his will*, the law presumes the act to proceed from a felonious intention, unless the circumstances under which it was done evince the contrary; for the security of private property is the care of the law, and the presumptions which it raises to attain that end cannot be repelled by even a specious pretence of right; much less in the present case, where the baseness of the design is apparent. Nor will the law suffer its object to be evaded by an ambiguity of expression; for if a man *animus furandi* says, "Give me your money—Lend me your money—Make me a present of your money," or words of the like import, they are equivalent to the most positive order or demand; and if any thing be obtained in consequence, it will form the first ingredient in the crime of robbery.

The *second* point considered was, Whether the prisoner had used that degree of violence, or inspired that degree of fear, which the law holds necessary to construe this offence. In the definition above-mentioned, these two words are included as descriptive of the cause and the effect; but the law does not in this case require an *actual violence* upon the person, or an existing fear in the mind. A man with a cutlass under his arm, or a pistol in his hand, demands and obtains the money of another without touching his person. Here no actual violence is used. "Suppose," says Mr. Justice *Foster*, p. 128, "the true man is knocked down, without any previous warning to awaken his fears, and lieth totally insensible while the thief rifles his pockets; where is the circumstance of existing fear?" And yet in both these cases the crime would be robbery. The putting in fear need not be laid in an indictment for this offence,

NOT

nor the fact of fear proved upon the trial; but if it be laid to be done violently and against the will, the law, *in adum spoliatoris*, will presume it. It is not even necessary that there should be *actual danger*; for a robbery may be committed without using an offensive weapon; as by using a tinder-box, or a candlestick, instead of a pistol. A reasonable *fear of danger*, caused by the exercise of a *constructive violence*, is sufficient; and where such a terror is impressed upon the mind as does not leave the party a free agent, and in order to get rid of that terror he delivers his money, he may clearly be said to part with it against his will. Nor need the degree of constructive violence be such, as in its effects necessarily imports a probable injury; for when a villain comes and demands money, no one knows how far he will go; and "if the fact be attended with those circumstances of terror and violence, which in common experience are likely to induce a man to part with his property, for the safety of his person," it is all the law requires. Sir Matthew Hale, 532, cites a case from the Year-Books of Edward the Third, which carried this doctrine still farther: "If thieves come to rob a man, and finding little about him, enforce him by menace of death to swear on a book to fetch them a greater sum, which he doth accordingly, this is a taking by robbery:" and yet when he fetches the money, he is removed from all terror but the fear of breaking his oath, and is out of the reach of violence.

But let us see how far the circumstances which attended the fact in the present case, will bring it within these rules of law. A young gentleman from school is accosted at night in London streets by a person he never saw before, whom he must suspect to be a villain. The stranger *demand*s a present. This conduct seems sufficient to satisfy the legal idea of robbery. But the prisoner goes further, and says, "You had better comply, or I will take you before a Magistrate." This is a threat of *personal violence*, for the prosecutor had every thing to fear, in being dragged through the streets as a culprit charged with an unnatural crime. The threat must necessarily and unavoidably impart intimidation. It is equivalent to *actual violence*; for no violence that can be offered, could excite a greater terror in the mind or make a man sooner part with his money. The menace is much stronger than that in *Harman's Case*, 1 Hale, 534, and it is implied, that if the violence in that case had preceded the theft, it would have been robbery. What can operate more powerfully on the mind than a menace to do that, which in its consequences would blast the fairest future and

ruin for ever the brightest character? It is much more likely that such a menace should occasion fear, than those which Mr. Serjeant *Hawkins* has mentioned in his Pleas of the Crown. It is however sufficient to implant a reasonable fear of danger which might operate in *constantem virum*, as well as in *matriculosum*, much more on the mind of a boy come from school for the holidays. It was argued by the prisoner's Counsel that this was a *fraudulent extorting*, and not a *taking by violence*: but in many cases fraud will supply the want of violence; as in burglary, where the breaking is a necessary ingredient: and yet if a person fraudulently get admission into a house by colour of law, or under pretence of taking lodgings, or of having business, it has frequently been held sufficient proof of a *constructive* breaking. Several of the JUDGES thought there was a great analogy between these cases and the present, and therefore that it ought to be governed by the like principles. There is no *actual breaking* in those cases of burglary; there is no *actual violence* in the present case; yet the fraud used in both amounts to a *constructive breaking* in one case, and to a *constructive violence* in the other; but the determination did not turn entirely upon this argument.

As to the *third* ingredient, *viz.* a taking from the person, the JUDGES were of opinion, That ingenuity could not raise a doubt upon the point.

But before I conclude, it may be proper to state the several authorities which support this determination of the JUDGES. The *first case* was that of *James Brown*, who was tried and convicted at the Old Bailey in October, 1763, for a highway robbery on *Ralph Hudson*; and he was executed. The second case was that of *Thomas Jones*, tried and convicted before Mr. Baron *Hotham*, in February Session, 1776; and his case was determined to be robbery by all the JUDGES at Serjeants-Inn-Hall; and he was executed. The third case was that of *Robert Harrold*, in last June Session, who was tried and convicted of the like charge; but he was afterwards reprieved upon some doubt on the evidence. In all these three cases there was this difference from the present case, that some actual violence was proved, as *taking and seizing by the arm and collar*. But the JUDGES all held, this did not make any material distinction; but that sufficient was proved in this case for the Jury to find the prisoner guilty of ROBBERY.

H A M-

HAMMOND'S CASE.

At the Old Bailey in May Session, 1787, *John Hammond* and *Mary Hammond* were indicted before Mr. Justice *Abbott*, present Mr. Baron *Perry*, on the statutes 9 Geo. I. cap. 22. and 27 Geo. II. cap. 15, for sending a threatening letter to *Daniel Dancer*, demanding the sum of ten pounds.

The indictment consisted of twelve counts; some of which charged, that the prisoners *sent* and *delivered* the said letter; and others, that they caused it to be *sent* and *delivered*.

It appeared in evidence, that *Mary Hammond* had written the letter in question; and that it was *delivered* to the prosecutor by *John Hammond*, who said he had found it in the prosecutor's garden. The prisoners were husband and wife, and they lived in the prosecutor's house in the character and capacity of servants; but there was no evidence that *John Hammond* had any knowledge of the contents of the letter.

The 9th Geo. I. cap. 22, enacts, "That if any person or persons shall knowingly *send* any letter without any name subscribed thereto, or signed with a fictitious name or names, demanding money, venison, or other valuable thing, such offender shall suffer death without benefit of clergy."

The 27th Geo. II. cap. 15, enacts, "That if any person or persons shall knowingly *send* any letter without any name subscribed thereto, or signed with a fictitious name or names, letter or letters, threatening to kill or murder any of his Majesty's subjects, or to burn their out-houses, barns, stacks of corn or grain, hay or straw, though no money or venison, or other valuable thing, shall be thereby demanded, every such offender shall suffer death without benefit of clergy."

It is also enacted, by 30 Geo. II. cap. 24, "That all persons who shall knowingly *send* or *deliver* any letter or writing with or without a name or names subscribed thereunto, or signed with a fictitious name or names, letter or letters, threatening to accuse any person of any crime punishable by law with death, transportation, pillory, or other infamous punishment, with a view or intent to extort or gain money, goods, wares, or merchandizes, from the person or persons

so threatened to be accused, shall be deemed offenders against law and the publick peace; and the Court before whom he shall be convicted, may order such offender to be fined and imprisoned; or put in the pillory; or publicly whipped; or to be transported according to the laws made for transportation of *felons*."

The Counsel for the prisoner submitted to the Court, That the offence described by the statutes 9 *Geo. I.* cap. 22, and 27 *Geo. II.* cap. 15. on which the indictment was founded, consisted in "*knowingly sending*" a threatening letter; but that the evidence only proved that *Mary Hammond* had *written* the letter in question, and that *John Hammond* had *delivered* it: and that there was no proof whatever of its having been in any way whatever *sent* to the prosecutor.

The Court thought the objection, as to the definition of the offence, well founded. In all cases, they said, so highly penal as the present case is, it is certainly necessary not only to consider the intention of the Legislature, but to bring the offender within the words of the Act of Parliament itself. The act of merely writing a threatening letter will not constitute this offence; for unless the writer or contriver of such a letter afterwards *send* it to the party whose fears the threat it contains was calculated to alarm, it cannot possibly produce the mischief which the Legislature intended alone to suppress; and they have accordingly adapted the words of both the statutes to that exigency, *viz.* "If any person shall *send* any such letter, they shall be guilty of felony," &c. Now it is impossible to conceive, that *carrying* a letter can by any construction be comprehended under the words "*send* any letter," which are the precise terms in which the statutes are penned. There can be no doubt, however, if the Legislature at the time they passed these Acts, had been asked, Whether the "*carrying* a threatening letter," or, to make it more like the present case, "*delivering* a threatening letter," was an offence which they meant to punish, and of the same kind as that which they had described by the words "*sending* a threatening letter," but that they would have answered, without doubt or hesitation, in the affirmative. The Judges however are not to consider what the Legislature would have done in certain cases, but to look at the words they have used, and to construe them according to the meaning which it is most likely they entertained at the time the subject was under their consideration. Now at the time these statutes

passed,

passed, it seems that the Legislature never had it in contemplation that any person would be the *carrier* of a threatening letter which he himself had written or contrived. They undoubtedly conceived that such a letter would be *sent* by the post, or by some other *secret* conveyance, so as to prevent the object of it from discovering the person from whom it was sent.

It is clear therefore that the act of delivering a threatening letter is not the offence described in the statutes of 9 *Geo. I.* cap. 22, and 27 *Geo. II.* cap. 13. But if any doubt could be entertained upon this subject, the Legislature itself has removed it; for by a subsequent Act of Parliament, 30 *Geo. II.* cap. 24, the offence of *delivering*, as well as *sending* a threatening letter, is made a *misdemeanour*, punishable in the discretion of the Court, according to the circumstances of the case. This statute makes it evident, that where the Legislature intended that a particular act should become an essential ingredient in creating the offence, they knew how to make use of proper words to express that intention; and affords incontrovertible proof that they had it not in contemplation to make the *delivery* of a threatening letter *felony*, at the time the statutes on which the present indictment is founded were passed. But there is still a question in this case for the consideration of the Jury; for though *Mary Hammond* is the wife of the other prisoner, yet if the Jury are of opinion that she wrote the letter herself, without any interference of her husband, and *sent* it by him, without his knowing any thing of the contents, to the prosecutor, *she* alone may be found *Guilty*; but otherwise, both the prisoners must be acquitted.

The learned Judge left it accordingly to the Jury, and they found both the prisoners NOT GUILTY.

PEDLEY'S CASE.

In the King's Bench, 1784, a Writ of *Habeas Corpus*, directed to the Keeper of Bristol Gaol, had been procured to bring up the body of *William Pedley*, the defendant. On reading the return, it appeared that he was detained in custody on three commitments. *First*, On an extent at the suit of the Crown. *Secondly*, On mesne process to the amount of £.10,000, at the suits of several creditors. *Thirdly*, On a warrant by Commissioners of Bankrupts, for not duly conforming to the satisfaction of the said Commissioners, touching the discovery and disclosure of his estate and effects.

Mr. *Cowper* moved that he might be discharged *quoad* the commitment by the Commissioners.

Mr. *Lawrence*, for the Commissioners.—By the statute 3 Geo. II. cap. 30, § 16, if a bankrupt shall refuse to answer, or shall not fully answer to the satisfaction of the Commissioners, all lawful questions put to him by the said Commissioners, it shall be lawful for the said Commissioners, by warrant under their hands and seals, to commit him to such prison as they shall think fit; there to remain without bail or mainprize, until he shall submit and full answer make to the satisfaction of the Commissioners.

It appeared to the Commissioners at the last examination of the Bankrupt, that a short time before the commission issued, he had in his Banker's hands the sum of £.5000, the whole of which he drew out, and left several of his acceptances, which were then due, unpaid. He was asked to give a reason for his drawing the money out of his Banker's hands. He answered, "I drew it out in order to ascertain whether my Banker would honour my drafts, when he had no money of mine in his hands." He was then asked, If he had afterwards drawn any drafts upon his Banker for this purpose? He answered, "No." He was asked, Why he did not try this experiment on his Banker, by drawing a draft at once upon him for a greater sum than he had in his hands? To this question he made no answer. He was asked in what manner he disposed of the money so drawn out. He answered, "I kept it in my house, together with other monies which I had collected elsewhere, amounting in

the whole to £.7000." He was asked, Why he did not pay a bill which was then due? He answered, "I did not chuse to part with the money." He was asked, How the money was ultimately disposed of? He answered, "A fire happened, which burnt my house and consumed the money." He was asked in what the money consisted. He answered, "I cannot give you any other account than that which I have already given."

On these answers he was committed by the Commissioners; but he submitted to a second examination: and on being again asked why he drew the money out of the Banker's hands, he gave a different reason for it to that which he had before given, and still persisted in refusing to say in what the money consisted; he was therefore remanded.

He made his escape from the prison; and on being retaken, he acknowledged that he had secreted the notes about him to the amount of £.7000, but that he had since destroyed them, for fear of being discovered.

Mr. Cowper, for the prisoner.—These answers, however insufficient they may appear, are such as the Commissioners were bound to receive as satisfactory. Their power extends only to cases where the bankrupt refuses to answer at all, or does not fully answer; and they cannot take upon themselves to decide whether the answers be true or false. If his answers be not true, he may be indicted for perjury, but they cannot commit him.

Miller's case in the Common Pleas, 3 *Will.* 427, is similar to the present. The Commissioners had committed a bankrupt for giving answers which they conceived were not satisfactory. They asked, Whether a part of his property, which they specified, had been sold by himself or by a broker? He answered, "*I believe I sold them by a broker.*" They desired that he would speak positively, but he refused to answer in any other way than that *he believed*. And *Ld. Ch. J. De Grey* said it was a mistake which mankind had fallen into, that a person could not be convicted of perjury for deposing on oath according to his *belief*: and the bankrupt was discharged.

LORD MANSFIELD.—It is certainly true, that a man may be indicted for perjury, in swearing that he *believes* a fact to be true, which he must know to be false. If a bankrupt swears fully and roundly, and the Commissioners have every reason to believe that what he swears is not true, yet they must take it to be satisfactory, provided that it would

be satisfactory, in case it were true. In the present case, every circumstance tends to shew that the bankrupt has sworn falsely. I am convinced he has perjured himself; but he has answered fully, and the Commissioners cannot commit him for false-swearing. He must therefore be discharged *quoad* the commitment of the Commissioners.

SPONSONBY'S CASE.

Old Bailey July Session, 1784, *John Sponsonby* was indicted for forging an indorsement in the name of *William Pearce* on a Bill of Exchange, purporting to be drawn by *Richard Davis*, in favour of *William Pearce*, on *Messrs. Crofts and Co.* for the sum of Four Guineas, with intention to defraud. FIRST, *Messrs. Crofts and Co.* and SECONDLY, one *John Churchill*.

There were also other counts for uttering the said bill, knowing the *indorsement* to be forged, with the like intention to defraud.

It appeared in evidence, that the prisoner had gone to *Messrs. Crofts and Co.* Bankers in Pall-Mall, and on receiving the four guineas, wrote the name "*John Churchill*" on the back of the bill, by way of witnessing the receipt of the money; the name "*William Pearce*" being then indorsed thereon.

William Pearce, the supposed payee, was an intimate acquaintance of *Richard Davis*, the drawer: and had received a letter of advice, signifying that such a bill, together with a Bank Note, had been remitted to him; and desiring him, as an act of friendship, to pay their produce over in discharge of a debt which *Davis* owed to one *Coles*. The bill never having come into *Pearce's* hands, he consequently had no property in it; and having no demand on *Davis*, the drawer, for its amount, it was agreed that he was a competent witness to prove that the indorsement "*William Pearce*" was not his hand-writing. But it was necessary first to shew, that he was the identical *William Pearce* to whom the bill was made payable; and as the testimony of *Davis*, the drawer, was the best evidence of that fact, and he was not present to attest it, the letter of advice which *Pearce* had received from him was held insufficient for the

purpose; and therefore his testimony to shew that the indorsement was forged was rejected: for although it might not be *his* hand writing, yet it might be the hand-writing of a *William Pearce*; or, as he had not been proved to be the person intended as the payee of the bill, it might be the hand-writing of the *William Pearce* to whom the bill was made payable.

The prisoner was accordingly acquitted on this indictment.

HOLLAND PALMER'S CASE.

At the Old Bailey December Session, 1784, *Holland Palmer* was convicted before *James Adair Esq. Recorder*, on the statute 23 Geo. III. cap. 49, § 20, for uttering 1000 pieces of paper with a counterfeit stamp thereon; but a question of law arose on the construction of the statute, and the case was submitted to the consideration of the TWELVE JUDGES.

The Statute, § 3, enacts, "that for every piece of paper, upon which any receipt or other discharge given for the payment of money amounting to Two Pounds, and not amounting to the sum of Twenty Pounds, shall be ingrossed, written, or printed, there shall be charged a Stamp-Duty of two pence; and by the 13th section the Commissioners of the Stamp-Duties are impowered, "to use and provide such stamps for the said duties as shall be requisite in that behalf. It is also enacted by § 20, "That if any person shall counterfeit or forge, or procure to be counterfeited or forged any stamp, or mark directed or allowed to be used by this Act for the purpose of denoting the duties aforesaid with intent to defraud his Majesty, or shall fraudulently use any of the said stamps or marks with the like intent, or shall utter, vend, sell, or expose to sale, any paper liable to the said duties, with any counterfeit mark or impression thereon, knowing the same to be counterfeited, such person shall suffer death without benefit of clergy."

The indictment also, pursuing the statute, charged, That a certain stamp was provided and used for stamping and marking every piece of paper upon which any receipt or other discharge given for the payment of money amounting

to Two pounds, and not amounting to Twenty Pounds, should be written or printed with a stamp of two pence: and that *Holland Palmer*, intending to defraud his Majesty of such right or duty, did utter and expose to sale, to one *Hannah Gabriel*, 1000 pieces of *papers liable to the said duties* of two pence, resembling the impression of the stamp then and their used in pursuance of the said statute, well knowing the said impressions to be counterfeit.

The objection arose upon the words "*papers liable to the said duties*," which, it was contended, were entirely void of the precise sense and definition to which they were applied; and incapable of any construction within the possible intention of the Legislature upon this subject.

On the 9th day of Hilary Term, 1785, all the JUDGES, except *Ld. Ch. Baron Skynner* and *Mr. Baron Hotham*, who were indisposed, assembled at *LORD MANSFIELD'S Chambers*; and the question was very fully and elaborately discussed.—On the first day of the February Session following, the result of the conference was delivered to this effect by

Mr. Justice Gould.—The objection arises upon a supposed inaccuracy of the words in the statute, "*paper liable to the said duties*;" which words the present indictment has pursued in the *plural number*, although a *duty* of one description only is mentioned; but the JUDGES are of opinion, that the indictment is properly drawn, and that in this and in every other respect it contains all the ingredients required by the A^ct. But the material question is, What the Legislature meant by the words "*paper liable to duties*?" and it was said, that as one particular piece of paper cannot be *liable* to any of the duties more than another, it would follow that all the writing-paper in the world, whether manufactured in England or at China, might be considered as "*paper liable to duties*:" and every utterer or seller of paper of any description indicted for a capital offence, in having exposed to sale "*paper liable to the said duties*." In answer to this suggestion, all the JUDGES are of opinion, that upon a due attention to the present statute, and the statute 24 *Geo. III. cap. 7*, passed in the succeeding Session upon the same subject, it will appear that the words "*paper liable to the said duties*," are capable of a clear and unequivocal meaning. There are two rules by which the expressions of the Legislature are to be interpreted. *FIRST*, if any part of an A^ct of Parliament is penned obscurely, and other passages in the same A^ct will elucidate that obscurity, recourse ought to be had to such context for that purpose. *SE-*
CONDLY,

CONDLY, If there are several Acts upon the same subject, they are to be taken together as one system, and as interpreting and enforcing each other. By adopting these rules in the present case, it will appear that the words "*paper liable to the said duties*," are not to be taken in the large and indefinite sense which was attempted to be imposed upon them; but that they mean distinctly such pieces of paper as are *designed or prepared*, for the uses mentioned in the statute. The statute, by § 14, describes the paper liable to duties, to be that paper "upon which any receipt or other discharge for the payment of money, shall be written; which before the same shall be written," is ordered to be brought to the Stamp Office to be stamped. And by 24 Geo. III. cap. 7. § 8, no paper required to be stamped by this statute shall be permitted to be stamped at any time after the same shall have been written, unless on the payment of Ten Pounds. The paper thus designed and prepared for the use of writing receipts thereon, is the paper meant by the words "*paper liable to the said duties*;" and therefore all paper upon the face of which a mark appears resembling the mark which the Act requires, is evidently paper liable to the duties, because the preparation of thus marking it discovers the purpose for which it is designed. Upon the papers mentioned in the indictment, there appears a false stamp or impression, resembling the true stamp which the law requires for receipts: this discovers the use for which they were designed and prepared, and brings them within the general words of the Act, "*paper liable to the said duties*." And the Judges are therefore unanimously of opinion, that the prisoner was properly convicted.

In January Session, 1785, *Ann Jones* was convicted at the Old Bailey on the same statute; but her judgment was respite until the above determination was known.

Both the prisoners received sentence of death.

MARTIN'S CASE.

At the Lent Assizes for Northampton in the year 1777, *Robert Martin* was indicted for stealing twenty pounds weight of wool, the property of *James Capps*.

It appeared upon the evidence, that the prisoner had pulled the wool from the bodies of sixteen lambs and lamb-oxen, viz. lambs of a year old, whilst they were living; and in some places had torn the skin away with it.

The property being taken from the bodies of living animals, a doubt arose whether it was the subject of larceny; and the question was referred to the consideration of the JUDGES.

The JUDGES were unanimously of opinion, That it was larceny; and the principle they went upon was, that where larceny may be committed of the thing itself, it may also be committed of the produce of that thing. Therefore, *alter Et à converso*, it is no larceny at common law to gather and carry away the fruit from a tree which is growing, because from its adherence to the freehold, it is not larceny to steal the tree itself. But it has been lately determined, upon a case referred by Mr. Justice *Bathurst*, that larceny may be committed by taking the milk from a cow, because it would be larceny to steal the cow itself. This distinction is agreed to by most of the antient writers upon Crown Law. *Dalton*, 21. *Crompton*, 36. But to prevent the thoughtless and wanton frolics which might be played with these trifling kinds of property from being prosecuted as petty larcenies, when perhaps they were unmixed with any fraudulent or felonious design, the law, proceeding upon the idea *de minimis*, requires the property stolen to be of the value of *twelve pence*. The question therefore, Whether felony or not, must depend on the circumstances denoting the intention; as the quantity of property taken, or the behaviour of the party at the time; and if a wicked disposition is discovered, *une disposition à faire un male chose*, as it is described by *Britton*, it may be evidence of felony, notwithstanding the trifling quality of the thing taken.

JOSEPH

JOSEPH JONES'S CASE.

At the Lent Affizes, 1777, for the City of Coventry, *Joseph Jones* was tried before Mr. Justice *Nares* for a misdemeanor; for that he, being an apprentice, bound by INDENTURE to serve one *William Lucas*, Jobbing-Smith, for the remainder of a term of seven years, and fraudulently devising to obtain money from the Paymaster of the 7th Regiment of Foot, did cause himself to be enlisted, without the consent of his master, as a foot-soldier in the said Regiment, and did unlawfully and deceitfully receive from the Paymaster the sum of £.3 8s. he, the said *Joseph Jones*, well knowing, &c. that he was disqualified from serving, &c.

To prove that he was disqualified, the master produced the indentures of apprenticeship, and claimed his apprenticeship. There were two subscribing witnesses to the execution of the Indenture, but neither of them were produced; and the execution of it was proved by other testimony.

The prisoner was convicted; but the case was reserved for the opinion of the TWELVE JUDGES, on a question, Whether, as the actual and legal binding was the fact which constituted the *gist* of the offence, the Indenture should not have been proved by the subscribing witnesses? And they were unanimously of opinion, That the indenture ought to have been so proved, and that the conviction was bad.

THE
LAWYER'S
AND
MAGISTRATE'S MAGAZINE,

For FEBRUARY, 1791.

ADJUDGED CASES

In the COURT OF KING'S BENCH, MICHAELMAS
TERM, 31 GEO. III.

MEAD v. YOUNG.

CHRISTIAN, a Merchant at Dunkirk, drew a bill for £. 50 upon the defendant, payable to Henry Davis, or order; and sending it by the Post, directed to Henry Davis, London, it got into the hands of a person of the same name, different from the one in whose favour it was drawn, who indorsed the bill, and discounted it with the plaintiff. It was admitted, that the plaintiff was not privy to any fraud in the transaction, and before he discounted the bill, he inquired of the defendant if the acceptance was his; but, the fraud committed by Davis being discovered before the bill became due, he refused payment; upon which this action was brought. Upon the trial, Lord Kenyon rejected the evidence, that the indorser was not the real H. Davis, in favour of whom the bill was drawn, as inadmissible, and directed a verdict for the plaintiff.

Now upon a motion for a new trial, the Court delivered their opinion as follows:

LORD

LORD KENYON, Ch. J.—The question here is, Whether the name of *H. Davis*, to whom the bill on the face of it was payable, shall or shall not convey a title to this plaintiff, who gave a valuable consideration for it, and who discounted it with the name of *H. Davis* upon it, and with an assurance from the defendant that it was accepted by him. If any fraud, or even neglect, could be imputed to the plaintiff, that would vary the case: but, circumstanced as these parties were, I think that, if the plaintiff cannot recover, it will put an insuperable clog on this species of property. I cannot distinguish this case on principle from that of *Miller v. Race* (1 Bur. 452), where the innocent holder of a note, which had been taken when the mail was robbed, was held entitled to recover; that indeed was a note payable to bearer; but still the same principle must govern both cases. In this case, the fault originated with the drawer of the bill, in not describing more particularly the person to whom he intended it should be paid. The plaintiff was not bound to send to Dunkirk to know whether the person, who had possession of the bill, was or was not the real *H. Davis*. There may indeed be some inconvenience the other way; but setting the inconvenience on the one side against that on the other, in my apprehension it would throw too great a burthen on persons taking Bills of Exchange to require proof of an indorsee that the person from whom he received the bill was the real payee. Such proof has never yet been required of an indorsee in such an action: and therefore I think that, as there was no fraud, or want of due diligence on the part of the plaintiff, he is entitled to recover; however, I give this opinion with some diffidence, as my brothers have intimated that they are of a different opinion.

ASHHURST, J.—This is a case of considerable importance; and I think that we ought to grant a new trial, that the parties may have an opportunity of putting the question on the record. The present inclination of my opinion is with the defendant. In order to derive a legal title to a Bill of Exchange, it is necessary to prove the hand-writing of the payee; and therefore though the bill may come by mistake into the hands of another person, though of the same name with the payee, yet his indorsement will not confer a title. Such an indorsement, if made with the knowledge that he is not the person to whom the bill was made payable, is in my opinion a forgery; and no title can be derived through the medium of a fraud or forgery. This is distinguishable from the case of *Miller v. Race*; for there the note was payable to bearer: in such a case the

bearer, who purchases for a valuable consideration, and without notice of any fraud, is entitled to receive the contents of the bill; and payment to him is a discharge to the drawer. But in this case the bill was drawn payable to *H. Davis, or order*; and though the name of *H. Davis* were indorsed on the bill, yet it was incumbent on the plaintiff, who claims through the payee, to be satisfied that that was the indorsement of the real payee.

BULLER, J.—As the bill in this case is of great value, the parties may put this question in a mode to be decided by the *dernier resort*. As at present advised, I entertain the same opinion as my brother *Ashurst*. If we were to inquire whether any laches were to be imputed to the plaintiff or the drawer, I rather think the plaintiff is more in fault than any other person in advancing his money to *H. Davis*, who was a total stranger to him. But, without going into any such inquiry, I am of opinion, that it is incumbent on a plaintiff, who sues on a Bill of Exchange, to prove the indorsement of the person to whom it is really payable: the general form of the declaration shews that it is so; for that is, that “the said *A. B.* to whom, or to whose order, the payment of the said sum of money mentioned in the said bill was to be made, afterwards, &c. indorsed the said bill, his own proper hand-writing being thereto subscribed.” Now, here it is clear that the indorsement was not made by the same *H. Davis* to whom the bill was made payable; and no indorsement by any other person will give any title whatever. Then, is there any thing in this case that estops the defendant from saying that the person who indorsed to him was not the real payee? Now the act of that person who indorsed, and who in so doing was guilty of a forgery, cannot prevent an innocent person from shewing the truth. Then it was argued that *Christian* was guilty of negligence, in not describing more particularly the payee; but I know of no authority which requires that to be done. This bill was drawn in the common form, payable “to *H. Davis, or order*;” and the drawer could not foresee that it would get into the possession of any other *H. Davis*. If any other stranger had received this bill, and indorsed it over to the plaintiff, it is not pretended that such indorsement would have conveyed any title to the bill; and it cannot make any difference whether such stranger bear the same name with the real payee or not; for no person can give title to a bill but he to whom it is made payable. Independently of these reasons, I think that convenience requires that the determination should be in favour of the
defendant

defendant. I have no difficulty in saying, that this *H. Davis*, knowing that the bill was not intended for him, was guilty of a forgery; for the circumstance of his bearing the *same name* with the payee cannot vary this case, since he was not the *same person*. Then if the plaintiff cannot recover on this bill, he will be induced to prosecute the forger; and that would be the case even if it had passed through several hands, because each indorser would trace it up to the person from whom he received it, and at last it would come to him who had been guilty of the forgery; whereas if the plaintiff succeed in this action, he will have no inducement to prosecute for the forgery; the drawer, on whom the loss would in that case fall, might have no means of discovering the person who committed the forgery, and thus he would probably escape punishment. As far, therefore, as convenience can have any effect, it weighs strongly with me to receive the evidence. But, at all events, the plaintiff cannot recover, since he derives his title under a forgery.

GROSE, J.—I am of opinion that it was competent to the defendant to shew in evidence that the person who indorsed to the plaintiff, was not the person named as the payee in this Bill of Exchange; and I form that opinion as well on the substance of the transaction as on the form of pleading in such cases. A Bill of Exchange is only a transfer of *a chose in action*, according to the custom of merchants; it is an authority to one person to pay to another the sum which is due to the first, and it is generally directed to be paid to the payee or his order. When the person, on whom it is drawn, accepts, he only engages by the terms of his acceptance to pay the contents of the bill to the person named in it, or to his order. The general form of the declaration, which is to be found in some of the old entries, also agrees with this doctrine, and points out what the law is: I observe indeed that this declaration is not drawn in the usual form, for the words “to whom or to whose order,” are omitted; but still it is that the *said H. Davis*, that is the same *H. Davis* who is mentioned in a former part of the declaration as the payee, indorsed to the plaintiff. It clearly therefore appears, that as no person can demand payment of a Bill of Exchange but the payee, or the person authorised by him, the acceptor only undertakes to pay to them, and cannot be compelled to pay to any other person. If he pay the amount of the bill to any other person, he pays it in his own wrong, and such payment does not discharge his debt to the drawer. If this decision will prove *log* on the circulation of Bills of Exchange,

will be less detrimental to the public, than permitting persons to recover through the medium of a forgery. And that this was a forgery cannot be doubted, if we consider the definition of it; which is, the false making of any instrument, indorsement, &c. with intent to defraud. It makes no difference whether the person making this false indorsement were or were not of the same name with the payee, since he added the signature of *H. Davis*, with a view to defraud, and knowing that he was not the person for whom the bill was intended. I agree also with my brother *Buller*, that this decision will be more convenient to the public; because then the plaintiff will prosecute the person, who indorsed to him, for the forgery. For these reasons I am of opinion, as this Bill of Exchange was only payable to the payee, or his order, it was competent to the defendant, the acceptor, to inquire whether the person under whom the plaintiff claims, were or were not the payee.

By the Court,

Rule absolute.

ROSS v. HUNTER.

This was an action against an under-writer, upon an insurance on goods on board the *Live Oak*, whereof *Joseph Rati* was master, from Jamaica to New Orleans. There were two counts in the declaration; 1st. that before the ship arrived at New Orleans, she, together with the goods, by the barratry of the said *Joseph*, he being master of the said ship, was run away with and wholly lost to the plaintiff.

2d Count, a loss by the perils of the sea.

C A S E.

The *Live Oak* was put up by *Joseph Rati*, who acted as master, as a general ship, in Jamaica, and the plaintiff, amongst other persons, shipped the goods in question, which were flour and other dry goods, on board her. She sailed on the voyage, insured in May, 1783, and arrived in June following at the mouth of the river Mississippi, which leads up to New Orleans in Spanish America, at the distance of about 35 leagues. When the Captain had got thus far, he dropped anchor,

anchor, and went in his boat up the river to New Orleans; and on his return, without carrying the ship to her port of destination, stood away for the Havannah; after his departure, from whence, he was never afterwards heard of. It appeared that he had a private adventure of negroes of his own on board, which there was reasonable evidence for supposing he intended to have disposed of at New Orleans; but finding it difficult to do so on account of an interdiction against the importation of them by the Spanish government, he went to the Havannah in quest of a market for them. Several letters were agreed to be received in evidence which passed between the plaintiff and his correspondents, from whence it appeared, that they had made every inquiry concerning Rati, but without success: and there was ground for believing that the vessel was afterwards lost. In these letters he was mentioned as the *master* of the vessel, and treated as one who had run away with the cargo; but whether he, or what other person, were *owner* of the ship, did not appear. The defendant, upon the trial, offered no evidence; but contended, that upon the plaintiff's own shewing he could not recover; for, as to the second count, the under-writer was discharged, there having been a clear deviation proved from the voyage insured, which was admitted. And as to the first count, there was no evidence of the Captain's having been guilty of *barratry*; for *non constat* that he was not *owner* or *general freighter* of the ship himself, or, if he were not, that he had acted contrary to the directions of the owner in going out of his original course; in either of which events he could not be guilty of *barratry*. But, admitting the evidence to be sufficient for that purpose, it was contended, that there had been a previous deviation before the *barratrous* intention took effect. But Lord Kenyon, who tried the Cause, being of opinion that the plaintiff was entitled to recover on the first count, the Jury found accordingly.

This was a motion to set aside the verdict and grant a new trial.

LORD KENYON, Ch. J.—The conclusion which the Jury have drawn by their verdict is, that this was *barratry*; and the question now is, Whether the evidence be sufficient to support that conclusion? The first point to be considered is, Whether Rati can be taken to be the *owner* of the ship? Now as to that, he was clearly proved to be the *captain*; but there was no proof whatever of his being *owner*. And if that fact were necessary to constitute the defence of the under-writer, the affirmative proof lay upon him. If we were to infer any thing, it would be the contrary; for Rati acted as *captain*.

the letters speak of him as having been once before *configned* to the house of Taylor and Montford; he is therein treated as a criminal who had run away with the ship and cargo. It is sufficient however to say that there was no proof of his being owner. Then the next question which arises is, Whether the ship going out of her course is to be attributed to deviation or barratry? Upon this head the question was well put at the bar, When did the barratry commence? It commenced when he first went out of the due course of his voyage in violation of his duty; and the verdict of the Jury was founded upon that ground.

ASHHURST, J.—The question is, Whether the plaintiff's evidence were sufficient to be left to the Jury as to the barratry of the master? As to which, the fact stands simply thus; the ship in question was put up as a general ship, of which Rati was stated to be the *master*: that *prima facie* then supposes him not to be the *owner*. Then the rule of evidence applies in this case, that the affirmative is always to be proved by those whose interest it is to prove it. Here it was the plaintiff's interest to prove that Rati was the *master*, which he did accordingly; if then it were for the defendant's interest to prove that he was also *owner*, it was incumbent on him to shew it: but there being no evidence of that sort, the Jury did right in finding him guilty of barratry on the facts which were in evidence before them.

BULLER, J.—Barratry is a question of law, which, like other questions of law, arises out of facts, and has been well settled. In one sense of the word it is a deviation by the Captain *for fraudulent purposes of his own*; and that is the distinction between *deviation*, as it is generally used, and *barratry*. Then the question is, Whether the Captain in this case deviated *with a fraudulent view*, so as to constitute *barratry* upon the evidence given in the cause? That will depend upon two questions; First, what it is necessary for a plaintiff to prove upon a declaration for the barratry of the Captain? and, Secondly, what evidence there was in this case of fraud in the Captain? 1st. It appeared that the ship had been put up as a *general ship*, ready to take the goods of any person to the port to which she professed to be destined; the owner of goods therefore may in such a case be supposed, in general to be an entire stranger to the ship; he deals with the Captain *quâ* Captain; he knows him in no other character; he acts under the information of the advertisement which is usually put forth on those occasions, wherein Rati was in the present instance described to be *master*. By the terms too of the policy the underwriter con-

tracted

tracted an indemnity the plaintiff against the barratry of this very man. In case then of a loss, what is incumbent on the plaintiff to prove? He must prove the subscription of the under-writer; his own interest in the goods; his shipping them on board the vessel described in the policy; and the loss of them in consequence of such an act by the Captain as amounts to barratry, that is, that he went out of the course of his voyage for a *fraudulent purpose*. It was not incumbent on the plaintiff to prove that the Captain was not the owner, for that would be calling on him to prove a negative; and if the Captain were not the owner, it is immaterial who was. Proof of that fact, which operates in discharge of the party, lies upon him. I agree that, if the Captain had freighted the ship for the voyage, he could not be guilty of barratry; but the proof of such fact lies equally on the defendant. It is then asked, Why it should not be presumed that the Captain went out of his course by the directions of his owner, if he had any? The reason is plain, because the Court cannot presume fraud in another person. The case put of an indictment for burglary does not answer the purpose for which it was cited. For suppose the goods were not actually taken and carried away, observe what would be sufficient to be proved; the fact of breaking and entering the house; and whose house it was; and that it was in the night; because all these circumstances are specifically alleged in the indictment, and they are all affirmatives; then the intent with which these facts were done, is equally material: but if the prosecutor prove all the former circumstances, it is a question for the Jury to determine whether he did not enter with the view of stealing the goods, unless the party accused can shew to their satisfaction that his intent was innocent. That brings me to the next question, which, in my opinion, is the most material one here, namely, What was the view of the master when he sunk his anchor at the mouth of the river Mississippi? for if it were done with a fraudulent view, I hold that the very sinking of his anchor was an act of barratry. His intent in so doing was a question for the Jury, and they have found by their verdict that it was the barratrous intention charged. It appears that he had some Negroes on board belonging to himself, which he wished to have disposed of at New Orleans, but finding upon going up thither in his boat that he should not be able to do so, he returned back again to his ship, and immediately sailed for another port. Then is it too much to say that he went to New Orleans for the purpose

of his own private advantage, and that the stopping the course of the ship was for a fraudulent purpose? Does it not prove clearly, that when he dropped his anchor, he did not intend going to New Orleans, unless it suited his own private advantage? The evidence too to be collected from the letters shews that he was considered as a thief and a criminal; and that all the persons concerned treated him in the character of *master* only.

Rule discharged.

SHIPMAN v. HERBERT.

An Action was brought at the Surrey Assizes against the defendant for selling leather without being searched and sealed, contrary to the statute 1 Jac. I. cap. 2, § 14, which gives certain penalties to be recovered by action of debt or information in the Courts at Westminster; and the 50th section give jurisdiction to the Justices of Assize, of gaol delivery, and of the peace, to enquire of the premises, and to hear and determine the same.

But a subsequent statute, 21 Jac. I. cap. 4, having enacted, “ that all offences hereafter to be committed against any penal statute, for which any common informer, or promotor, may lawfully ground any popular action, bill, plaint, suit, or information, before Justices of Assize, Justices of *Nisi Prius*, or Gaol Delivery, Justices of Oyer and Terminer, or Justices of Peace in their General or Quarter-Sessions, shall be commenced, sued, prosecuted, tried recovered, and determined, by way of action, plaint, bill, information, or indictment, before the Justices of Assize, Justices of *Nisi Prius*, Justices of Oyer and Terminer, and Justices of Gaol Delivery, or before the Justices of Peace of every county, &c. having power to enquire of, hear, and determine, the same, &c. and that all and all manner of informations, actions, bill, plaints, and suits, whatsoever, hereafter to be commenced, sued, prosecuted, or awarded, either by the Attorney General, &c. or by any common informer, or other person whatever, in any of his Majesty’s Courts at Westminster, for or concerning any of the offences, penalties, or forfeitures, aforesaid, shall be void, and of none effect.”

It was contended that the jurisdiction of the superior Courts was taken away by the statute of the 21 *J. 4.* and that the defendant could only be proceeded against by indictment, or presentment, in the inferior Courts; and a verdict was taken for one penalty, subject to the opinion of this Court upon the question.

LORD KENYON, Ch. J.—The accurate discussion, which this case has received, has rendered it so clear as to remove all doubts about it. This action is brought on the 1 *J. 1. cap. 22.*, which imposes certain penalties; and enacts, that the penalties shall be recovered by action of debt, bill, plaint, information, or otherwise, in any of his Majesty's Courts of Record, in which suit no wager of law or essoin shall be admitted. Therefore this action may undoubtedly be supported, unless the jurisdiction of this Court be taken away by the subsequent statute of the 21 *J. 1. cap. 4.* Then the general question must depend on the construction of this Act of Parliament. But some preliminary questions having been made, they may be first disposed of. It has been argued, that the 21 *J. 1.* does not extend to acts passed subsequent to it, and that this may be considered as an action brought on a subsequent statute; the 1 *J. 1. cap. 22.* having expired before the 21 *J. 1.* and having been only re-enacted since that time. But on this point I have not entertained a doubt from the beginning. We are all most clearly of opinion that this must be considered as an action on the 1 *J. 1. cap. 22.*; and that the subsequent laws, which have continued it from time to time, all give effect to it as an act made in the reign of the 1 *J. 1.* Therefore all the cases, which decide that this statute of the 21 *J. 1.* prohibits this mode of proceeding, will apply to this case, as far as respects the date of the Act of Parliament, provided it applies to it in other respects. Another objection made at the bar was, that the 9 *Anne, cap. 11.*, has inflicted other penalties for this offence; and that, because a summary mode of proceeding is given by the 36 & 37 *sect.* of that Act before two Justices, with a power of mitigating the penalties, the jurisdiction of this Court is taken away; for which the case of *Cates v. Knight* was cited. But that argument is totally unfounded; the penalties in the latter statute are accumulative, and imposed with a different view; and this statute does not affect to repeal the provisions of the 1 *J. 1. cap. 22.* It was not pretended in the case cited, that a later statute necessarily repealed

repealed the penalties given by a former law; the sole question there depended on the construction of two different sections in the same Act of Parliament. Then as to the principal question in the case; an attentive consideration of the words of 21 J. I. cap. 4, § 1, will remove all doubts concerning it: it enacts "That all offences against any penal statute, for which any common informer may lawfully ground any popular action, bill, plaint, suit, or information, before *Justices of Assize, Justices of Nisi Prius, or Gaol Delivery, Justices of Oyer and Terminer, or Justices of Peace in their Sessions*, shall be commenced, sued, prosecuted, tried, recovered, and determined, by way of action, plaint, bill, information, or indictment, before the *Justices of Assize, &c.* or before the *Justices of Peace of every county, city, &c.* wherein such offences shall be committed, and not elsewhere." Then this Act of Parliament does not extend to all proceedings on penal statutes; it only prohibits the proceedings in the Courts of Westminster in all those cases where popular actions, bills, plaints, suits, or informations, might have been brought in the inferior Courts. But neither of those modes of proceeding, to recover the penalty inflicted by the 1 J. I. cap. 22, is given by the 50th section of that Act; and that clause only enables Justices of Assize, Justices of Peace, &c. within their several jurisdictions, to enquire of all the premises in their Sessions, leet or law-days, and to hear or determine the same. Now when a power is given to a jurisdiction, which does not ordinarily entertain actions, bills, or plaints, and that power is only generally to enquire of, hear, and determine, the offence, it must be understood to mean by the common law mode of proceeding, namely, by indictment, or presentment. There is no pretence to say that an action, bill, or plaint, can, by the common law, be brought at the Assizes, the Sessions, or at Courts Leet. Therefore it appears most clearly, that the statute 21 J. I. cap. 4, has only excluded the jurisdiction of the superior Courts in certain enumerated cases; and, as this is not one of those cases, the statute 21 J. I. does not apply to it. It was argued, that the 21 J. I. cap. 4. is a beneficial law, and ought to be extended as far as possible: but if the Legislature had thought so, they would have extended the benefit of it to all penal statutes passed subsequent to it, which are infinitely more numerous than those made before that time; and I think it is more beneficial to the subject that his cause should be heard and determined by the superior Courts of Record. Then several cases were cited at the bar to shew that this

statute restrained the proceedings on all prior penal statutes to the Courts below: but all those cases are founded on the statute 5 *Eliz.* the 39th section of which expressly gives power to Justices of Oyer and Terminer, and Justices of the Peace, &c. to hear and determine the offences contrary to that statute, as well by indictment, as by *information, action of debt, or bill of complaint*: This Act, having given an action in inferior jurisdictions, however dissimilar it is to the common law remedy, precisely shews the meaning of the 21 *J. I.* cap. 4, and to what cases that latter statute applies. On the whole, therefore, considering the authorities which have been cited, the statute of the 5 *Eliz.* cap. 4, and that of the 21 *J. I.* cap. 4, I am clearly of opinion that the latter Act only applies to those cases where proceedings by way of action, bill, plaint, suit, or information, may be commenced in the inferior Courts; and consequently that it does not extend to the present, where no such proceeding can be instituted.

ASHHURST, J.—It is a clear principle, that where the superior Courts have a jurisdiction, it can only be taken from them by the express words of an Act of Parliament, or by necessary implication. Here it is admitted, that an action might be maintained in the superior Courts by virtue of the statute on which this action is brought: then the question is, Whether that jurisdiction be or be not taken away by the 21 *J. I.* cap. 4? Now the meaning of that Act I take to be this: that where the superior and inferior Courts have a concurrent jurisdiction *both as to the subject matter, and as to the mode of proceeding*; the jurisdiction of the former is taken away. And it is clear, that in this case the statute 1 *J. I.* cap. 22. did not give to the inferior Courts a concurrent jurisdiction with the superior ones as to the mode of proceeding; for it did not give to the informer a power of suing for the penalty in the inferior Courts by action, bill, plaint, suit, or information. Then it follows that the 21 *J. I.* does not apply to this case; for it appears from the case cited from *Carthens* that that statute did not give a jurisdiction to inferior Courts in cases where they had none before. But it was argued that the 21 *J. I.* cap. 4. applies to this case, because the inferior Courts have jurisdiction over this subject matter in *some* mode of proceeding, namely, by indictment, and that that statute restrains the proceedings in the superior Courts where the informer may sue by *any* mode in the inferior Courts: but that argument militates against a known principle of law, that the jurisdiction of

the superior Courts is not to be taken away but by express words, or by necessary implication.

BULLER, ^oJ.—It is now too late to say that the statute 21 *Ƴ.* 1 gives a new jurisdiction to the inferior Courts; to this point the case in *Carthew* is a direct authority. But it has been argued, that though it give no new jurisdiction, yet that it repeals so much of the 1 *Ƴ.* 1. cap. 22, as gives the *action*, and leaves the informer to sue by indictment: but that is directly contrary to the case cited from *Carthew*, where an action, similar to the present, was maintained, and this very objection was over-ruled. Then an argument was drawn from the preamble of the 21 *Ƴ.* 1. which professes to be an Act “for the ease of the subject; and it was contended that, if this construction were put upon it, it would only apply to two or three statutes, and therefore that the intention of the Legislature would be frustrated. But as the words of the enacting part are clear and positive, we cannot have recourse to the preamble to extend the construction of the Act. Besides, it appears that almost all the cases, which existed previous to the 21 *Ƴ.* 1. and which must be taken as the foundation of that statute, were proceedings on the 5 *Eliz.* cap. 4: now if there were many actions on that statute, that alone might have been considered as a sufficient grievance to induce the Legislature to remedy it, by restraining the proceedings to the inferior Courts in cases where those Courts had jurisdiction. Therefore it seems to me that the true meaning of the statute is this: that wherever by any Act then in force, the informer might have sued by action, bill, plaint, suit, or information, in the inferior Courts, as well as in the Courts at Westminster, he is confined to sue in the former: but, as that statute gives no new jurisdiction to the inferior Courts, the party may still sue in the Courts at Westminster for all those penalties which could not, before the passing of that statute, have been recovered in the inferior ones.

GROSE, J.—The words of the 21 *Ƴ.* 1. cap. 4. are strong in favour of the construction which has been put upon them; but, if they were doubtful, the cases, which have been determined upon this subject, are decisive. For in all of them, in which it has been holden that the 21 *Ƴ.* 1. restrains the proceedings to the inferior Courts, those Courts had an express jurisdiction. That this is the true construction also appears from other statutes, in which the Legislature has expressly given to inferior jurisdictions a power to distribute the penalties. On the whole, I am clearly

clearly of opinion that in this case the informer could not have recovered the penalty by action, bill, plaint, suit, or information, in the inferior Courts, by virtue of the 1 J. I. cap. 22; that it was not the intention of the Legislature, in passing the 21 J. J. cap. 4, to give such a jurisdiction; and that that statute is only applicable to cases where, before that time, the penalty might have been recovered in the inferior as well as the superior Courts by action, bill, plaint, suit, or information.

Rule discharged.

DOE on the Demise of WILLIS against MARTIN.

Upon a trial of this ejectment at the *Hants* Assizes, a special verdict was found; which stated, that Bethia Legg, being seised in fee of the premises in question, situated in the Isle of Wight, on her intended marriage with Richard Willis, by deeds of lease and release, dated the 14th and 15th of February, 1757, between Richard Willis of the first part, Bethia Legg of the second part, and Peter Bracebridge and Robert Willis of the third part, conveyed to Bracebridge and Robert Willis, and their heirs, to the use of herself in fee till marriage, and afterwards, to her sole and separate use for life, without impeachment of waste, and not to be subject to the controul or debts of her husband; remainder to the use of Richard Willis for life, without impeachment of waste; remainder to the use of all and every the child or children or such of them of Richard Willis and Bethia for such estates and interest, &c. and in such parts, shares, and proportions as Richard Willis and Bethia should by deed appoint; and for want of such appointment, then to the use of the child or children of Richard Willis and Bethia in such parts, shares, and proportions, and for such estates and interest, as the survivor of them should by deed or will appoint; "and for want of such appointment then to the use of all and every the child, or children, equally, share and share alike," to hold the same, if more than one, "as tenants in common," and not as joint tenants, "and if but one child, then to such only child, his or her, heirs or assigns for ever;" and in default of such issue, then to the use of the survivor of Richard Willis and Bethia, in fee.

The deed contained the following proviso; That, in case the said Richard Willis and Bethia his intended wife, or the survivor of them, should at any time thereafter be desirous to make sale of the said manor, &c. or any part thereof, then and in such case it should and might be lawful to and for the said Richard Willis, and Bethia his intended wife, or the survivor of them, at any time or times thereafter, by any writing or writings to be signed or sealed by the said Richard Willis and Bethia his intended wife, or the survivor of them, "to revoke and make void all and every, or any, the use and uses," trust or trusts, estate or estates, therein respectively before limited, and declared of and concerning the said manor, &c. with the appurtenances; "and for the said Philip Bracebridge and Robert Willis," or the survivor of them, his heirs or assigns, "to sell and dispose of the same," for the best price that could or might be had or gotten for the same, "and convey the same to a purchaser thereof, so as that the purchase money thereof should be paid into the hands of the said Philip Bracebridge and Robert Willis, or the survivor of them, his heirs and assigns, and not into the hands of the said Richard Willis and Bethia his intended wife, or either of them, to be laid out and invested by the said Philip Bracebridge and Robert Willis, or the survivor of them, his heirs or assigns, in the purchase of other freehold messuages," lands, &c. at the request of the said Richard Willis and Bethia his intended wife, or the survivor of them, to "be settled to the same uses," trusts, intents, and purposes, as were therein before limited, &c. It was also provided, that the trustees might invest the purchase-money in government or other securities in their names, and pay over the dividends to the persons, who would have been entitled to the profits of the real estates. And, for the security of the purchaser of the estate, it was agreed, that the payment of the purchase money unto the trustees, &c. should discharge such purchaser, notwithstanding any loss or mis-application that might happen to such purchase-money. The verdict then set forth, that on the 3d of March, 1757, the marriage between Richard Willis and Bethia Legg took effect; and that they had several children (to wit) Richard Legg Willis, their eldest son and heir, James Willis, Bethia Ann Willis, and Mary Willis, the lessors of the plaintiff; and also one Thomas Willis, since deceased. That Robert Willis survived Philip Bracebridge, his co-trustee, and by will appointed Mary Willis his widow, and Richard Willis, his brother, executor and executrix thereof, and in January, 1765,
died,

died, leaving Robert Willis, an infant, his only son and heir at law; which last mentioned Robert Willis, at the time of executing the indentures of 14th and 15th of April, 1767, hereafter mentioned, was of the age of five years. That on the 17th of September, 1766, the first-mentioned Richard Willis, the lessor's father, being insolvent, or much embarrassed in his circumstances, contracted and agreed with Joseph Martin, now deceased, for the sale of the said manor, &c. for £.7680; and that before and at the time of making the contract, and from thence and until and at the time of executing the indentures of the 14th and 15th of April, 1767, hereafter mentioned, Joseph Cruttenden, Attorney at Law, and one of the Solicitors of the Court of Chancery, "was the general agent of the said Joseph Martin, and acted as such agent in the transaction hereafter mentioned." That "Cruttenden was also the agent of the first-mentioned Richard Willis (the lessor's father) in this particular transaction." That on the 17th of February, 1767, Cruttenden, who had previously received, and had in his custody, the marriage-settlement of the said Richard Willis and Bethia Willis his wife, and the title-deeds of the said manor, &c. presented a petition on behalf of the first mentioned Richard Willis and Bethia his wife, to the Right Honourable Charles Lord Camden, then Lord High Chancellor of Great Britain, stating (amongst other things) to the effect herein before mentioned, and that were the said petitioners to exercise the power so given to them of revoking the uses and trusts of the said recited settlement, for the purpose of making a sale of the said manor, &c. so settled as aforesaid, yet as there was no power given to them to limit or declare any new or other use or uses, either to the petitioners or their heirs, or otherwise, so as to convey a good legal title to a purchaser, the petitioners were advised that, on such revocation being executed, the legal estate would result unto, and become vested in, the said Robert Willis the infant, as heir of the surviving trustee, in trust to convey the same to a purchaser, pursuant to the power before mentioned: in which case it was apprehended that the said Robert Willis, the infant, would become an infant trustee within the statute of the 7th of *Anne*, intituled "An Act to enable Infants who are seised or possessed of Estates in Fee, in Trust, or by way of Mortgage, to make conveyance of such Estates;" stating also that a doubt had arisen upon the construction of the latter proviso in the settlement, to whom the purchase-money should be paid, and by whom laid out, and invested, in the purchase of

land to be settled to the uses of the marriage settlement; that the petitioners were desirous that the agreement entered into with Martin should be carried into execution; that a good legal conveyance should be made of the manor, &c. unto the said Martin and his heirs, discharged from the uses and trusts of the settlement; that the purchase-money should be paid to the executors of the surviving trustee, to be invested according to the trusts of the settlement; and therefore praying that it might be referred to one of the Masters in Chancery, to examine and certify whether the said Robert Willis, the infant, were a trustee within the Act; and that upon the Master's Report, such further orders might be made as to the Lord Chancellor should seem meet. The verdict then stated an order of reference, dated 17th of February, 1767, to Mr. Lane, one of the Masters in Chancery, to examine and certify how the said manor, &c. were vested in the said Robert Willis, the infant, and whether he were an infant trustee within the Act; and that Cruttenden attended the said Master Lane upon the order of reference as solicitor for the first-mentioned Richard Willis and Bethia his wife, and also as solicitor for Robert Willis the infant. The verdict then stated that the Master reported on the 23d of March that Robert Willis, the son, was an infant trustee within the meaning of the Act; but no notice was taken in the report of the proviso for revoking the uses in the settlement, or of the application of the purchase-money, or of any doubt suggested in the petition. Upon the making of this report, Cruttenden presented another petition on behalf of Richard and Bethia Willis to the Lord Chancellor, reciting the order of reference, and the Master's Report, and praying that the Report might be confirmed; and that upon payment by Martin of £.7680 unto the executors of Robert Willis, the surviving trustee, to be by them invested according to the trusts of the settlement, Robert Willis, the infant, might be directed to join in a conveyance of the manor, &c. to Martin, discharged of the trusts of the settlement. That, previous to the hearing of the petition, Cruttenden prepared and delivered a brief to counsel for Richard and Bethia Willis, and another brief to another counsel for Mary Willis and Richard Willis, the executor and executrix, containing merely a direction for him (if necessary) to consent on their behalf to the prayer of the last petition, so far as the same concerned the executors, and another brief to another counsel for Robert Willis, the infant, containing merely a direction for him to submit on behalf of Robert Willis, the infant, to such order

der as the Court should make in respect to him on the last petition. That on the hearing of that petition on the 20th of March, 1767, the Lord Chancellor made an order, whereby, after stating the report, and that counsel for the petitioners and Robert Willis, the infant, had attended on that day, and that the counsel for Robert Willis, the infant, did not oppose the prayer of the last petition, the Lord Chancellor ordered that the Master's Report should be confirmed, and that Robert Willis, the infant, according to the report, should convey the premises pursuant to the Act of Parliament; which last-mentioned order was made by the Lord Chancellor before any revocation of the uses created by the indenture of the 15th of February, 1757. That on the 31st of March, 1767, by a certain deed or instrument in writing, prepared by Cruttenden, and indorsed on the indenture of the 15th of February, 1757, and duly executed by the first-mentioned Richard Willis and Bethia his wife, they by virtue and in pursuance of the power and authority in the last-mentioned indenture contained, and by force and virtue of all other powers, &c. revoked and made void all and every the use or uses, &c. in the last-mentioned indenture limited and declared of and concerning the said manor, &c. which by the last-mentioned indenture, and the lease for a year hereby referred to, were granted, released, and conveyed by Bethia Willis to the several uses, and for the several purposes, in the same indenture mentioned, to the intent and purpose that the fee-simple and inheritance thereof might be sold and conveyed according to the true intent and meaning of the last-mentioned indenture, and of the parties thereto. The verdict then set forth indentures of lease and release dated the 14th and 15th of April, 1767, which were prepared by Cruttenden, and made between Robert Willis, the infant, of the first part, Mary Willis, widow, and Richard Willis, executor and executrix of the second part, the first-mentioned Richard Willis and Bethia his wife of the third part, and Martin of the fourth part, by which, in consideration of £.7680 paid by Martin to Robert Willis, the infant, and Richard Willis and Mary Willis the trustees and executors, before named, or to one of them, with the privity and consent, and by the direction and appointment, of the first-mentioned Richard Willis and Bethia his wife, Robert Willis, the infant, by virtue of the said Act of Parliament, and in obedience to the order made in pursuance thereof, with the privity and consent, and by the direction and appointment, of the first-mentioned Richard Willis and Bethia his wife, granted,

bargained, sold, and released, and the first mentioned Richard Willis and Bethia his wife, by virtue of all powers and authorities granted to them, or either of them, implied, reserved, or appertaining, limited and appointed, granted, bargained, sold, released, ratified, and confirmed the said manor, &c. to Martin in fee. That upon the execution of the last-mentioned indenture, the sum of £.5180, part of the consideration money, was paid by a draft or check drawn by Martin on the house of Messrs. Martin and Co. (in which house Joseph Martin was then a partner) in favour of the first-mentioned Richard Willis, or bearer; and which draft or check was delivered by Martin to Cruttenden, and by Cruttenden, "for form's sake," to Richard and Mary Willis, executor and executrix, and by them (Richard Willis and Mary Willis) to Robert Willis, the infant, "for form's sake;" and "that the draft or check was finally taken from Robert Willis, the infant, by the first-mentioned Richard Willis, in the presence of Cruttenden, and by him, the first-mentioned Richard Willis, applied to his own use;" and that the residue of the consideration-money was duly paid by Martin, in satisfaction of a mortgage on the manor, &c. charged thereon before the making of the indenture first-mentioned. The verdict then stated, that "Martin had personally no intention to defraud the children of the first-mentioned Richard Willis and Bethia his wife," or to defeat the settlement; "but that Cruttenden, being such agent as aforesaid, and the first-mentioned Richard Willis, fraudulently combined together to procure the purchase-money to be paid into the hands of the first-mentioned Richard Willis, and which was accordingly effected by means of the proceedings aforesaid," and which proceedings were by Cruttenden and the first-mentioned Richard Willis calculated for that purpose; "and that no part of the purchase-money was ever laid out, or invested, by Robert Willis, the infant, or any other person or persons, in the purchase of other freehold messuages, lands, &c. pursuant to the proviso" in that behalf contained in the indenture of the 15th of February, 1757. The verdict then stated, that in *Hilary* Term, 9 *Geo.* III. a fine *sur consueance de droit come ceo*, &c. was levied of the premises in question by Richard Willis and Bethia his wife to Joseph Martin. That on the 21st of December, 1775, Joseph Martin, by will, devised to the defendants and their heirs upon certain trusts therein mentioned, and died in March, 1776; on whose death the defendants entered, &c. In 1778 Bethia Willis died; and in 1780, the first-mentioned Richard

Richard Willis also died, without making any appointment by virtue of the power contained in the release of February, 1757. On Richard Willis's death, Richard Legg Willis was beyond the seas, and did not return till the latter end of the year 1785; James Willis was then an infant, of the age of 19 years; Bethia A. Willis was of the age of 18 years; and Mary Willis is still an infant. Thomas Willis, having survived Richard Willis and Bethia, died in 1782, being then an infant; after whose death, and within five years next after, Richard Legg Willis returned to this country, and James Willis and Bethia A. Willis, attained their respective ages of 21 years, and before the time when, &c. they the said Richard Legg Willis, J. Willis, B. A. Willis, and M. Willis, in due form of law entered, &c. in order to avoid the fine; and thereupon became seised, &c. and being so seised, caused an action to be commenced for trying the title, &c. within one year next after such entry, which action is now prosecuting with effect, according to the form of the statute, &c. And after such entry, and while they were seised, they demised to the plaintiff, &c. who entered, and was possessed thereof until the defendants entered and ejected him, &c. But whether, &c.

This case was argued much at large, but as the chief points are noticed in the Decisions of the Judges, we do not recite them here.

LORD KENYON, Ch. J.—The principal question in this case is, Whether the remainders to the children of *Robert* and *Bethia Willis* were vested or contingent? if the latter, it cannot be disputed but that the destruction of the particular estate, on which they depended, before they became vested, would destroy them. One argument which has been used is, that the estate limited to the trustees was an use executed in them, for that otherwise the estate limited to the wife for her sole and separate use, would not be secured to her, but would be under the husband's controul. But, in answer to that, it is sufficient to observe that it is limited to the trustees, without saying "to and to the use of the trustees." If none of the limitations of the settlement could possibly take effect without this construction, I should be inclined so to decide it? as was done some years ago in a case in the House of Lords. But that is not the case here; for this estate was limited to *Bethia Willis*, and to her heirs, *until the marriage should be solemnized*; it was therefore intended that the legal estate should not be taken out of her *until the marriage took effect*. Besides, the Court of Chancery would consider the husband, if it vested in him, a trustee

for the wife, so that she might have all the benefit intended by the marriage-settlement. If the remainders to the children of *R.* and *B. Willis* were contingent, the objection made by the defendants, that the conveyance by *Willis* and his wife, and the fine, by destroying the particular estate before they vested, also destroyed those remainders, must prevail; for it is too late, as the law stands, to say that such is not the established doctrine of contingent remainders. This doctrine indeed involves in it difficulties which have been frequently felt by wise and able lawyers, who have wished to break through the rule: but they have been deterred from the attempt by a consideration of the consequences that might possibly ensue. There are two instances, it is true, where the law is otherwise; in equitable estates, where the contingent remainders are not destroyed, because the estate is vested in trustees to preserve the contingent remainders; and in copyholds, where the estate in the Lord of the Manor will support all the remainders: but in the case of freehold estates of inheritance, the rule is so established that it is not now to be shaken. On the first question in this case our judgment must depend on the authorities cited; the three leading of which are *Lovie's* case, *Walpole v. Lord Conway*, and *Cunningham v. Moody*. Of the first, inserted in *Rolle's Abridgement*, which was published under the inspection of Sir *Matthew Hale*, it is sufficient to say, that it was held in a case circumstanced like the present, that the remainder was contingent. This was also adopted in a great measure by Lord *Hardwicke*, in *Walpole v. Lord Conway*. But I am happy to find that, in the last of those cases, *Cunningham v. Moody*, where the same point arose, and where Lord *Hardwicke* had an opportunity of re-considering this question more fully, and at a time of life when his judgment was more mature, that great Judge determined differently. And I cannot find any *substantial* distinction between that case and the present. There Lord *Hardwicke* (after saying that the fee was not in abeyance) added, "nor does the power of appointment made any alteration therein; for the only effect thereof is, that the fee which was vested was thereby subject to be divested if the whole were appointed." Now in this case, the limitations to the children were first subject to a power of appointment, but for want of such appointment to the children *in fee* (I say in fee, as I shall shew in the course of my opinion). And whether the limitations precede or follow the power of appointment, it makes no difference. The object of the parties here was, to make the whole estate subject to the power and will of the

the parents, according to the situation and exigencies of the family. I therefore say, in the words of Lord *Hardwicke* in *Cunningham v. Moody*, that the fee was vested in the children, subject however to be divested by the execution of the power of appointment. The opinion of Lord *Hardwicke*, in the latter case, is peculiarly deserving of attention, because when it was discussed, the former one of *Walpole v. Lord Conway*, where he had intimated a different opinion, was strongly pressed upon him, and because too he decided the last case at a time when he had the assistance of some of the most eminent lawyers who ever attended the Bar of that Court. I cannot therefore forbear thinking that, on the authority of that case, we ought to decide that the remainders to the children were vested, subject nevertheless to be divested by the parents executing the power of appointment. No appointment has been made; and therefore at the time when the acts stated in the verdict were done by the parents in opposition to the interests of their children, the limitations to the children were not destroyed. This decision puts an end to this cause as far as respects all the children but one: but it has been contended, that they only took estates for life, and that, one being since dead, the reversion in fee of the parents immediately came into possession. And that brings me to the next question, Whether the children took estates for life or in fee? which arises on these words: "And for want of such appointment, then to the use of all and every the child or children, equally, share and share alike, to hold the same, if more than one, as tenants in common, and not as joint-tenants, and if but one child, then to such only child, his, or her, heirs, or assigns for ever." And the question is, Whether the words "his or her heirs" may not with propriety, and ought not, considering the whole settlement, and the manifest intention of the parties, to act, as words of limitation on all the preceding words in the sentence? I cannot bring myself to doubt but that they may. By putting the stops, or using the parenthesis, as pointed out by the plaintiff's Counsel, it becomes perfectly clear. And we know that no stops are ever inserted in Acts of Parliament, or in Deeds; but the Courts of Law, in construing them, must read them with such stops as will give effect to the whole: If then we use the points suggested by the Counsel, the clause will read thus "to the use of all and every the child or children, equally, share and share alike, his or her heirs or assigns for ever." If this had been like the case of *Hay v. Lord Coventry*, we might have lamented that the parties had

not inserted words of inheritance to carry their probable intent into execution, but we could not have supplied them. But in this case there are words of inheritance; and I think we should defeat the manifest intention of the parties, and the object of the settlement, which was to give the children estates of inheritance, were we not to read this part of it in the manner contended for by the plaintiff's Counsel.

Then it has been argued that the rights of the children, whatever they were, were subject to the power of revocation by the parents; and that the deed of revocation, standing *per se*, and taken separately from the conveyance of Martin, defeated their rights: but I am clearly of opinion, taking the whole of the power together, that that deed was no legal revocation. They had only a power to revoke *on condition* of re-investing the money in the purchase of another estate for the benefit of their children. And it would be strange to say that any interval might happen between the sale and purchase of that other estate; it was all to be considered as one deed and one act. And though the purchase-money need not have been re-invested immediately, yet it was to lie in the hands of the trustees in the mean time, until a proper opportunity should offer of so re-investing it. But it is said that the transaction, as far as Martin was concerned, was fair and honourable, and that the fraud only consists in the misapplication of the purchase-money: but, without imputing any fraud to Martin, and indeed it is negatived by the verdict, the maxim, that the principal is civilly responsible for the acts of his agent, universally prevails both in courts of law and equity; and therefore, whatever misconduct and fraud are imputed to Cruttenden by the verdict, it must affect his principal, Martin. Now the conduct of Cruttenden in this transaction is too infamous to be stated. Nothing can be clearer than that this was not a case within the statute of *Anne*. At present we are not called upon to decide what was the effect of what was done by the Lord Chancellor, or how far we, sitting in a Court of Law, can investigate what was done there; for this case does not depend upon that inquiry: the subsequent proceedings put it out of all doubt. We must remember, that the power of revocation was restrained *so as* that the purchase-money should be paid into the hands of the trustees, (*and not into the hands of R. and B. Willis*), and by them laid out and invested in the purchase of other freehold estates; the whole therefore was considered as one transaction. Now,

in order to comply with this requisition, that was done in point of form, but not in substance; for it is expressly stated in the verdict, that the draft was delivered by Cruttenden, "for form's sake" to R. and M. Willis, and by them to R. Willis, the infant trustee, "for form's sake," and then taken from him, who ought to have applied it, and put into the hands of that very person of whom the settlors were jealous, and to whom they had expressly directed that it should not be paid; and in truth it never was applied to the purposes of the settlement. This then was a gross rank fraud, which contaminates the whole transaction, and renders it absolutely void, as well in a Court of Law as in a Court of Equity. Therefore the lessors of the plaintiff are entitled to recover to the full extent.

ASHHURST, J.—The general question on the whole of this case is, Whether the persons conveying had a right to convey the estate in question? For if not, however fair the transaction may have been on the part of the purchaser, the defendants cannot retain, but the legal title must prevail, without considering the hardship of their case. In order to determine this, the first consideration is, Whether the lessors of the plaintiff had a *vested* interest, and what was the *quantum* of that interest? And, secondly, Whether any acts have been done to divest them of that interest? as to the first, I am of opinion that the limitations to the children were *vested*. The authorities on this point cannot indeed be reconciled: *L. Lovie's* case is rather against this opinion; but the latest authority, that of *Cunningham v. Moody*, which appears to be well considered by Lord *Hardwicke*, seems decisive. The facts in that case do not *materially* differ from those in the present; and the *principle* of it is immediately applicable. Then the limitations to the children became vested on their birth, subject however to be divested by the appointment. As to the *quantum* of estate which ~~these~~ children took, I think they took a *fee*; for it is ~~doing~~ *no* great violence to the construction of the limitation to ~~them~~ to say, that the words "his or her heirs, or assigns, for ever" apply to the words in the former branch of the clause, by leaving the intervening words in a parenthesis. With respect to the second question, Whether their interests were divested by the acts stated in the verdict? that could only be done by a *due execution* of the power of revocation; a bad execution has no operation whatever. Now I consider this power not an *absolute* but a *conditional* one; for it is *so* ~~as~~ that the purchase-money be paid into the hands of the ~~trustees~~.

trustees; and not into the hands of R. and B. Willis, and be laid out in the purchase of other lands. Two conditions were therefore annexed to the execution of the power; the one that the money be paid into the hands of the trustees, the other that it be laid out in the purchase of other lands and settled to the same uses. Now neither of those has been complied with; and consequently the deed of revocation is a mere nullity, and does not divest the estates limited to the children. If we were to enter into the question of fraud; to be sure a more gross and infamous fraud never appeared on the records of the Court than that which was practised by the agent of the purchaser, and for which the principal is responsible: but the determination of the two first points renders this inquiry unnecessary.

BULLER, J.—This case has been so fully discussed both on the Bench and at the Bar, that I will content myself with stating the general grounds of my opinion. On the question relative to the power of revocation, little remains to be said: that the revocation was fraudulent, is clear for the reasons given by my Lord. It was the object of the settlors to settle the money, arising from the sale of the estate, on other estates to the same uses, if it could be done with advantage. The power of revocation was *conditional* only; the money was to be paid into the hands of the trustees on condition and for the express purpose of thus settling it: but, that condition not having been complied with, the deed of revocation is void.

With respect to the first and principal question; the argument on the part of the defendants, as far as authorities are concerned, rests on *L. Lovie's* case, and on that of *Walpole v. Lord Conway*. But what was said by Lord Coke in the former case, certainly did not apply to the point before the Court; the question there arose on the will only; and nothing was said either in argument or by any other of the Judges on the construction of the deed. The same case is also reported in *Moor* 772; where it appears, that the remainder under the will was contingent, because it could not arise unless the eldest son died without issue, and there was *also* an alienation. Therefore I think it did not occur to Lord Coke that a remainder, when once vested, could be afterwards divested by the execution of the power. If there were no authority against this case, I could not have made up my mind to agree to it: but his opinion has been since controverted in other cases. In *a Lord Raym.* 1150, Mr. J. Powell, speaking of *L. Lovie's* case, said, "Though it was a doubt in *L. Lovie's* case, whether a remainder could be limited after

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a contingent fee, yet it is none now. And therefore if a fee-simple be limited to such persons as *A.* shall appoint by his will, remainder over, that is a good remainder vested till the appointment." Now the instance there put is directly this case; and if the limitations to the children were vested on the birth of a son, nothing has since happened to divest them. The defendant's counsel have rather hinted at, than insisted on, a difference between this case and that put by one of the plaintiff's counsel, of a remainder to the first and other sons of *A.* with a remainder to the first and other sons of *B.* his brother, where, on the birth of *B.*'s son before *A.* had any son, the remainder would vest in the former, subject to be divested on the birth of a son: but I see no distinction; for when a child of Robert and Bethia Willis was born, the limitation was vested in him exactly in the same manner as if the limitation had been to their first and other sons. If there had been no power of appointment, the limitation to the children would have vested on the birth of a child: that was the point decided in *Lewis Bowles's* case. Then, suppose the limitation to the children had been followed by a proviso containing a power of appointment, that would not have varied the case: if so, what difference is there, either in reason or in law, whether the power of appointment be inserted in one part of the instrument or the other? The Court must consider the *whole deed* together in order to collect the intention of the parties. As to the *quantum* of interest which the children took, that question also seems equally clear. Suppose the limitation were to "all and every the children, and *his* or *her* heirs and assigns for ever;" that would not be grammatically written; but, the intention of the parties being manifest, the Court must read it thus, *his, her, or their* heirs and assigns for ever. This question arises on a family settlement, which was made for the benefit of all the children of the marriage: and in order to give effect to the intention of the parties, we may leave the intervening words in a parenthesis, by which means the word "heirs" will have relation to the words in the former part of the sentence.

GROSE, J.—If my brother Buller found the case so much exhausted as to make it unnecessary for him to go fully into every part of it, much less necessary is it for me to do so. The first considerable question is, Whether the remainder to the children, which was certainly contingent in its creation, did or did not become vested in the children as they came in esse? I confess I was at first forcibly struck with *L. Lord's* case, and *Walpole v. Lord Conway*, as also with the

definition of a contingent remainder. But I think that the rule laid down in *Cunningham v. Moody* is the best and wisest construction; and there the rule is, "that a remainder may vest, liable to be divested by the execution of a power of appointment." The ground of it is, that the Courts will never suffer the fee to be in abeyance but from necessity. And I am the more inclined to adopt this rule, as being the most likely to give effect to the intention of the parties; which the contrary doctrine would probably defeat. Therefore I think that on the birth of the children, the limitations to them became vested: and as to the *quantum* of estate which they took, I have not a particle of doubt. By reading the words in the mode adopted by the Court, all the difficulty is removed. With respect to the execution of the power of revocation; I cannot read it without seeing what was the plain intention of the parties to the settlement. It was to enable the husband and wife to revoke the former uses, and the trustees to sell the estate, *so as* that the money should be paid to the trustees, and be by them applied in the purchase of other estates to the same uses. This then I consider only a *partial power* of revocation, which was given to them only for the purpose of effectuating the other part of the power, that of investing the money in other lands more beneficially for the children; and the whole must be taken together. It is admitted that some part of the transaction was fraudulent: but it is argued that the different parts of the transaction may be considered separately from the rest; and that the fraud consists not in the revocation, but in the subsequent misapplication of the money. But I think that the fraud was in the conveyance, which was made with an intent not to apply the money as directed by the settlement, but to pay it into Willis's hands. This was merely a conditional power, which must be considered altogether; and no part of the execution of it can be good, unless the whole be.

Judgment for the plaintiff.

DOE on Demise of BLANDFORD v. APPLIN.

This was an ejectment, upon which a verdict had been taken for the plaintiff, subject to the opinion of the Court.

C A S E.

A. Dymock, being seised in fee of the premises in question, by will dated 29th August, 1758, devised as follows: "I give and bequeath unto my nephew William Dymock, all that my freehold estate that I bought of Mr. Kingstone, situate at Alhampton, in the county aforesaid, to hold to him during his natural life, and, after his decease, *to and amongst his issue*, and, *in default of issue*, to be divided between my nephew Elias Dymock, and my niece Mary Dymock, and to their heirs and assigns for ever." A. Dymock, the deviser, died in 1758: wherein William, the nephew, entered into the premises, and, in Michaelmas Term, 1759, suffered a recovery thereof. In 1761, William married Mary Baker, by whom he had one child only, named Ann, who survived her father, and died an infant in June, 1770. William died the 2d of September, 1769, having devised the premises to his wife, under whom the defendant claims. Elias Dymock, one of the lessors of the plaintiff, is the Elias mentioned in the will of A. Dymock. Mary Blandford, the other lessor of the plaintiff, is the daughter of Thomas Dymock, the elder brother of William, and as such heir at law of A. Dymock the deviser, and of Ann the infant daughter of William, and also heir at law of Mary Dymock, the niece of Abraham, mentioned in his will, which Mary survived William, and died unmarried, and intestate.

LORD KENYON, Ch. J.—Although this will is very inaccurately drawn, I think we may collect the deviser's general intention from the words of it. The great question in this case is, What estate W. Dymock took under the will? In the first clause the estate is expressed to be given only during his natural life, but, in the next limitation, it is to go *to his issue*, and in default of issue only was it to go over; it is clear therefore, from the whole of the will, that

the devisor did not intend that it should go over to those in remainder, until after a general failure of issue in W. Dymock. Now I think we are warranted by many determinations, and particularly by that of *Robinson v. Robinson*, (1 Bur. 38), to give that effect to the will which will best answer the devisor's *general intention*, though by so doing we may defeat some *particular* intent. Here the general intent was, that W. Dymock and his issue should take first; then what construction will best effectuate that intention? It has been argued by the plaintiff's counsel that W. Dymock took only an estate for life, and his children an estate tail: but it would be difficult to put two different interpretations on the word issue; and, even if that could be done, it would not further the intention of the devisor in this case: for there are no cross remainders to the children, and they can never be implied; so that, according to the construction contended for, if one of the children died, his share would go over to those in remainder, in prejudice of those children who survived, which was certainly not intended by the devisor. Therefore we shall best answer his general intent, by saying that W. Dymock took an *estate-tail*; and, in so determining, we shall not go farther than has been done in other cases; especially in *Robinson v. Robinson*, where the estate was expressly given to *L. Robinson* for life, and no longer, and after his decease to such son as he should have, taking the name of *Robinson*, and for default of such issue, then over: there, notwithstanding the devisor said in express terms that *L. Hicks* should only take for life, and no longer, this Court were of opinion that, in order to effectuate the manifest general intention of the devisor, he must by necessary implication take an estate-tail. It is not necessary to go through all the cases on this subject, which are for the most part collected in *Robinson v. Robinson*; in addition to which is *Dubber v. Trollop*, 8 Vin. Abr. 233; but the result from them all is, that the Court is to put such a construction on the whole of the will as will best effectuate the general intention of the devisor, contrary to one of the limitations, if a different construction will defeat the general intent. Then, according to that principle, I think that in this case W. Dymock took an estate-tail; and consequently that the remainders were barred by the recovery.

BULLER, J.—I am not inclined to differ from my Lord in the construction which he has put upon this will, though I think by so doing we shall go farther than has ever been done in any of the former cases; because, in order thus to construe the will, we must reject the words “and amongst.”

But

But if we were to give effect to those words, it would defeat the general intent of the will, which will be better effected by giving an estate-tail to W. Dymock. For the devisor certainly intended to prefer all the issue of W. Dymock before the more distant branches of the family, which would not be the case, as there are no cross remainders, unless W. Dymock took an estate-tail. The word "issue" may mean *children*, or *heirs of the body*: but it is too much to say that it means children in this will, for then grand-children would be excluded, and the next clause "in default of issue" could not have any effect at all. It therefore must mean "heirs of the body." Therefore I think that, as by rejecting the words "and amongst" the general intent of the devisor will be best effectuated, we are warranted in rejecting them.

GROSE, J.—Upon the mere words, I should think that W. Dymock took only an estate for life; and yet if we were to put that construction on the will, it would defeat the general intention of the devisor, which can only be carried into effect by considering "issue" as a word of limitation. There is no case in which "issue" has been determined to be a word of purchase, unless coupled with other words expressing such an intent; but here the contrary intent appears. Mr. J. Rainsford, in *Finch* 282, arguing upon the distinction between *issue* and *children*, said, "the word *issue* is, *ex vi termini, nomen collectivum*, and takes in all issues to the utmost extent of the family, as far as the words *heirs of the body* would do;" and he observed, that it was resolved in *Wild's* case, 6 Rep. 17. "that a devise being to the father and mother, and after their deaths to the children, the word "children" shall be a name of purchase, and not of limitation, and they shall have but an estate for life: but had it been to their issues (as in the case then before him), that word *issues* would have been construed a word of limitation, and not of purchase; and so it was lately resolved in the Exchequer Chamber; and a judgment given in the King's Bench to the contrary, was reversed upon the authority of *Wild's* case." That case is strong to shew that issue is a word of limitation, and not of purchase, and that it is different from children. And as the devisor's intent in this case will be best effectuated by determining that W. Dymock took an estate-tail, that is the best and most legal construction to this will.

Postea to the defendant.

DOE vs the Demise of BEEZLEY v. WOODHOUSE.

C A S E.

Ejectment. Thomas Heys, being seised in fee of certain copyhold premises according to the custom of the manor, which he surrendered to the use of his will, and also of freehold and leasehold estates, by will, dated 17th of Jan. 1764, devised as follows: I will that my debts and funeral expences be paid out of my *whole estate*, by my executors. And whereas I am now possessed of one half of a leasehold estate lying and being in Kirkdale, held by a lease under the Right Honourable Edward Earl of Derby for three lives, one whereof is now in being, the same together with all my other *real estates*, I give, devise, and bequeath, unto my loving wife Catherine Heys, during her natural life; and likewise I give unto my loving wife Catherine Heys all my *personalty* during her natural life; and I further likewise give her a power of disposing and giving, either by will or otherwise, all my linen, &c. [enumerating certain articles of furniture]; and *all* the remainder of my goods and furniture I give to be sold by my executors, and the money arising from the sale thereof I give to be divided amongst my nephews and niece hereafter named, share and share alike. I give unto my brother William Heys, 40*l.* yearly, to be paid him by four quarterly payments, during his natural life, *by my executors* hereafter named, *out of my whole estate*. I give unto my cousin John Heys, 6*l.* yearly, to be paid him by four quarterly payments during his natural life, *by my executors* hereafter named, *out of my whole estate*; *the aforesaid dividend of the money arising from the sale of my goods, and the yearly payments out of my estates*, to my brother William Heys and to my cousin John Heys, are not to commence till after the death of my loving wife Catherine Heys. "The remainder of the profits, after the death of my loving wife Catherine Heys, after the yearly payments made to my brother William Heys, and my cousin John Heys, out of my *WHOLE* estate, I give to be divided amongst Thomas Heys, George Heys, and Jane Heys," sons and daughter of W. Heys, equally, share and share alike. He then gave several pecuniary legacies, and (among them) one of 10*l.*

to his niece N. Beezly. Catherine Heys, the widow, entered on the deviser's death, and afterwards died in 1785. George Heys, the eldest brother of Thomas Heys, the deviser, died in the life-time of Thomas Heys, and before the making of the will, without male issue, leaving Ann Beezly the lessor of the plaintiff, and who is described by the name of Nancy Beezly, his only legitimate daughter, and heiress at law, and who is also the heiress at law of Thomas Heys the deviser. Ann Beezly, before the death of the deviser, intermarried with Thomas Beezly, who died before this ejectment was brought. Ann Beezly, after the death of Catherine Heys, entered into and was seised of the premises. William Heys the brother, and John Heys the cousin of the deviser, died after the deviser, and in the life-time of Catherine his widow; William Heys having had issue Thomas Heys, George Heys, and Jane Heys, the devisees mentioned in the will of Thomas Heys who also survived the deviser, but died in the life-time of Catherine his widow. The defendant, Catherine Heys, is the heiress at law of Thomas and George Heys, sons of William Heys, and nephew of the deviser; and the defendant John Woodhouse is the heir at law of Jane Heys, daughter of William Heys, and the niece of the deviser. The defendant, Catherine Heys, and John Woodhouse, were, on the 25th of January, 1787, admitted tenants to the copyhold estates according to the custom of the manor; and after the death of Catherine Heys, the deviser's widow entered into the premises in question. The personal estate of Thomas Heys, the testator, of which he died possessed, over and above the amount of his debts and the legacies bequeathed by his will, amounted to £2000.

This case came before the Court upon a Special Verdict, and the question was, What estate the executor took under the will.

LORD KENYON, Ch. J.—In the beginning of the will, the deviser, after reciting what estates he had, devised all his real estate, and also all his personalty, to his wife for life: then he considered how his personalty should go afterwards, and he accordingly bequeathed it to his executors, to be divided among his nephews and nieces share and share alike. This therefore was a disposition of the whole of one branch of his property. But, there being other persons for whom he meant to provide, he proceeded to give annuities to them, payable out of his whole estate, directing that “the aforesaid dividend of the money arising from the sale of his goods, and the yearly payments out of his

estate [to those annuitants] should not commence until the death of his wife:” and then he devised “The remainder of the *profits*, after his wife’s death, *after the yearly payments*, [to the annuitants] *out of his whole estate*, to be divided among two nephews and a niece, share and share alike.” Now if the goods and furniture had exhausted all the personal estate, the annuitants might have resorted to the profits of the real estate. And this construction is supported by the terms “*yearly payments*,” which are more applicable to real than to personal property; for if money be out on interest, the dividends are said in the law to arise from day to day. Then as these annuitants were to take a beneficial interest out of the real estate, and the payments were to be made by the executors, the latter must of necessity take a fee, in order to answer the charges made upon them, as has been determined in a variety of cases; for if the executors were to take an estate for life only, the annuitants might have survived them. How far the whole of this property is exhausted by these means, it is not necessary for us to decide here, it is sufficient for the determination of this case, that there is an outstanding-term in the executors; if there be any resulting trust for the heir at law, he must apply to the Court of Chancery. But it is clear, that in this case the whole estate necessarily vested in the executors by way of an use executed, because that which they were required to do, could not be answered by a less *quantum* of estate.

BULLER, J.—The words “whole estate,” occur several times in this will; and in all the places in which they are used, they mean *all the property* which the deviser had. In the first place, the debts are to be paid out of his *whole estate*, which must charge the real as well as the personal estate. Then, after giving the residue of his personalty, he gave specific annuities, which are to be paid out of his *whole estate*; these therefore must be paid out of his *real estate*. Now if we once know the meaning of the words “whole estate,” as used by the deviser, there is an end of the question. And if by “whole estate” the deviser meant his *real estate*, the devise of *the remainder of the profits out of his whole estate* must pass the fee. The case cited from *Douglas* is against the plaintiff: for there Lord *Mansfield* said, that a devise of “all my estate” will pass an estate of inheritance; but as that was only a devise of “all the deviser’s lands lying in such a place,” it was not sufficient. But here “estate” is used, which in its natural import will carry a
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fee-simple, unless there be words to controul it; and as there are no words in this will to that effect, the executors must take a fee.

GROSE, J.—In order to give effect to the deviser's intention, it is necessary that the executors should have the absolute power over the whole of his real estate.

Judgment for the defendant.

Dox on the Demise of HENEAGE against HENEAGE.

Upon the Trial of this Ejectment at the Lincoln Assizes, the Defendants took the following.

C A S E.

That Thomas Heneage, deceased (the late grandfather of the lessor of the plaintiff in the ejectment), being seised in fee of the premises in question, by will dated the 28th of February, 1735, devised the same to his brother George Heneage, and to William Taylor, and their heirs, &c. in trust, as to part of the premises, to the use of his wife Catherine Heneage, for life, in lieu of her dower, remainder to trustees for a term of 500 years, upon certain trusts which never took effect (and which term hath been since duly surrendered by the trustees), remainder as to the part before limited to the said Catharine, and also as to the parts whereof no use was therein before limited, to the use of his son George Fieschi Heneage, by his first wife, for life, remainder to the use of the said George Heneage, and William Taylor, and their heirs, "during the life of the said G. F. Heneage," in trust to preserve the contingent uses and estates therein alter limited, nevertheless to permit the said G. F. Heneage to receive the rents, &c. thereof during his life," remainder to the use of the first and other sons of G. F. Heneage successively in tail-male, remainder to the use of the deviser's son Thomas, by his then wife, for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons of the said Thomas He-

neage (the son) successively in tail-male, remainder to the use of the devisor's third and other sons successively in tail-male, remainder to the devisor's right heirs in fee. In which will is contained the following proviso: " Provided always, and my will is expressly, that in case it shall happen that my said son G. F. Heneage, or any other son or sons of his, to whom the said manors, &c. therein before-mentioned, are limited as aforesaid, shall ever inherit or take by descent, or by any gift, grant, or devise, or otherwise become seised in possession for his or their life or lives, or for any greater estate, of the whole or so much of the real estate of my said brother George Heneage, as shall exceed the yearly value of the estate by this my will limited, in use to him and them by £.100 by the year, that then and from such time as my said son G. F. Heneage, or any son or sons of his, shall so inherit, or take by descent, gift, grant, or devise, or otherwise become seised in possession of such or so much of the said real estate of my said brother George Heneage as aforesaid, for the term of his or their natural life or lives, or of any greater estate, all and every the use and uses, limitations, and estates, herein before created and declared of and concerning the said manors, &c. herein before-mentioned, to and for, or in favour of, my said son G. F. Heneage, or any son or sons of his, so coming into possession of such and so much of my said brother's estates as aforesaid, shall cease, determine, and be utterly void. And in such case, my will and meaning is, that the next in remainder, according to the uses of this my will, shall succeed to, and have and enjoy my said estate hereby devised, " as if my said son G. F. Heneage, or any such son or sons of his, was or were respectively dead;" any thing herein before contained to the contrary thereof in any wise notwithstanding."

T. Heneage, the devisor, died on the 18th of May, 1740. leaving the said Catherine Heneage, since also dead, his widow, and G. F. Heneage, his eldest son and heir at law; whereupon G. F. Heneage entered upon the premises limited to him for his life, (except such part as was limited to Catherine Heneage for her life, for her jointure). Catherine Heneage died on the 16th of October, 1766, whereupon G. F. Heneage entered upon the premises so limited to her for her jointure, and was, and continued in possession of all the premises in question until his death, on the 21st of March, 1782. G. Heneage, the devisor's brother, who was also seised in fee of several manors, &c. by will dated the

the 20th of July 1751, devised the same to the use of his nephew, the said G. F. Heneage, for life, remainder to his first and other sons successively in tail-male, with divers remainders over, and with the reversion to his own right heirs. The deviser, George Heneage, died on the 25th of August, 1753; on which his nephew, G. F. Heneage, entered upon the premises devised to him by his uncle's will, and which exceeded the yearly value of the estates above limited to him for life, by his father's will, by £.100, and upwards, by the year and continued in possession till the said 21st of March, 1782, when he died, leaving issue of his body, the defendant, his eldest son and heir, and the lesser of the plaintiff, his second son. At the death of the said George Heneage, the uncle, G. F. Heneage had no son. The defendant was born on the 21st of December, 1768, and the lesser of the plaintiff on the 28th of September, 1771. G. F. Heneage had also a son named George B. Heneage, who was born on the 17th of March, 1767, and died the 10th of May, 1768, before the birth of the defendant. Thomas Heneage (the son of the testator Thomas Heneage, named in his will,) died unmarried and without issue, on the 27th of February, 1751, in the life-time of the said George Heneage; and the deviser, Thomas Heneage had no third or other son. The ultimate limitation in the will of the said Thomas Heneage to his right heirs, was vested in G. F. Heneage, as heir of his father Thomas Heneage, at the time of the death of the said George Heneage, the uncle. Upon the death of G. F. Heneage, the defendant, his eldest son, took by devise, and became and still is seized in possession in tail-male of the estate of George Heneage (the brother of the said first-named deviser Thomas Heneage), under the will of George Heneage, and which estate of George Heneage exceeds the yearly value of the estate devised by the will of Thomas Heneage by £.100 by the year and more. Upon the death of G. F. Heneage, the defendant also entered upon the premises in question, and is still in possession thereof, and hath never had any issue of his body.

LORD KENYON, Ch. J.—This is one of those cases on which it is impossible to raise any doubt. It was owing to the anxiety of the parties at the time of the trial, and not to any doubt of my own, that this question was referred for the opinion of the Court. The general outline of the will, stripped of technical terms, is this: the deviser, who was a younger brother, left his estate to his eldest son.

life, remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail, with a proviso, that if the larger estate should descend from the elder branch of the family to his eldest son, his own estate should go to the younger branch of his family: that event did happen, the uncle's estate descended to the devisor's eldest son. The argument now used is, that, notwithstanding such may have been the devisor's intention, he has not used proper limitations to give effect to it: and the objection is, that the particular estate having been determined before the contingent limitations could take effect, those limitations were defeated. But that objection depends on the not giving effect to one of the most important limitations in the will, namely, that to the trustees to preserve contingent remainders *during the life of G. P. Heneage*: those are the common words inserted in every limitation of this kind; and there is nothing in this will to induce us to imagine that the devisor intended that the estate limited to the trustees should not continue during the whole natural life of his eldest son. Unless therefore the defendant can obliterate those words from the will, or shew that they cannot have any effect, there is an end of his claim; but most unquestionably their estate did continue during the eldest son's life. It is not necessary to decide here who was entitled to the rents and profits after G. F. Heneage succeeded to his uncle's estate, and before he had a son born: it is sufficient for the determination of this case that the trustees had a right of entry during the whole of G. F. Heneage's life, and were to receive the rents and profits, for some purpose.

Poslea to the Plaintiff.

MOSELEY

MOSELEY v. PIERSON.

This was an action upon the case against the defendant for having sold oatmeal on market-days, in the town of Manchester, in an inclosed shed at a public house, where it was delivered to the buyer.

The declaration stated that the plaintiff was, and still is, lawfully possessed of a market, holden and to be holden in Manchester, on Saturday in every week throughout the year, for buying and selling flour and oatmeal, and other goods *usually sold in markets*; and by reason thereof the plaintiff, of right, ought to have a reasonable toll of all flour and oatmeal *sold, or exposed to be sold*, within the said town on any of such market-days, not being the flour or oatmeal of any person legally exempt from the payment of such toll, viz. one quart and one quarter of a quart of flower out of every twelve score pounds weight of flour, and a quart and a quarter of a quart of oatmeal out of every twelve score pounds weight, *sold, or exposed to be sold*, within the same town on any of such market-days; yet that the defendant, on Saturday the 3d of April, 1790, and on other Saturdays, wrongfully and injuriously sold divers large quantities of flour and oatmeal, and exposed to sell divers other large quantities on the same market-days in a private, secret, and clandestine manner, whereby the plaintiff was prevented taking his toll, and could not enjoy his said market and tolls as he ought to have done. But the claim of toll was not laid in the declaration to arise from *goods brought into the market, and there sold or exposed to sale*.

Upon the Trial at the Assizes the plaintiff was nonsuited, upon the ground that he was not able to produce evidence that toll ever had been taken of flour, &c. *sold, which had not been brought into the market*.

Now upon a motion to set aside this nonsuit, the Court delivered their opinion as follows:

LORD KENYON, Ch. J.—I here is no doubt on the law on this subject; for most unquestionably the plaintiff must prove his claim as it is laid in the declaration. But the only question is on the legal meaning of the word *sold*, as it is here used. There may indeed be a sale by sample in fraud

of a market, but not *quod* sale in a market; for the expression "a sale in a market," imports that the goods sold, are brought into the market, and ready to be delivered to the purchaser. Now here the claim is of a toll in specie, which necessarily implies that the commodity, in respect of which the toll arises, is brought into the market. The precedents cited by the plaintiff's counsel, weigh stronger with me than that mentioned on the other side; for they must all have proceeded on a mistaken idea of the legal definition of a sale in a market, if the construction contended for by the plaintiff's counsel be wrong: whereas that cited by the defendant, only shows that some words, which were not absolutely necessary, were inserted by the pleader. But the ground on which my opinion proceeds is, that on the facts disclosed in this declaration, I cannot consider it *as a sale in a market*, unless it be in the mode in which sales are generally made in markets, namely, *by selling the goods which are brought into the market* for that purpose. If the plaintiff's demand had arisen on contracts of sale by sample, he would have brought a different kind of action, namely, an action for the fraud in not bringing the goods into the market. It is not necessary in this case to determine whether or not a right to take toll on goods sold by sample can be supported: it is sufficient for the decision of this case, in the present stage of it, to say that the evidence offered at the trial should have been received, and that a new trial ought to be granted.

ASHHURST, J.—I am not prepared to say that this non-suit is wrong. This claim being a matter *stricti juris*, it should be laid in the declaration with great precision; because it is to remain on record as evidence of the right to future ages; and if the plaintiff were to recover on this declaration, I think this record would be evidence of a claim of toll on contracts of sale of goods in the market by sample. With respect to the precedents which have been cited; *non constat* but that in those cases, the claim might have been of toll on all goods sold, though not brought into the market; and many such instances have existed. Therefore I think that the plaintiff should have shewn on the trial that such was the extent of his claim. But as he confessed that his claim was of a more limited kind, he ought to have laid it as precisely as he intended to prove it.

GROSE, J.—As it appears that in point of fact the goods, in respect of which the toll was claimed, were actually brought into the market, I see no reason why the plaintiff
 should

should not have stated his claim to arise on the sale of such goods: but still I do not think that the non-suit can be supported. Taking the whole of the declaration together, as this is a claim of toll in specie, I am of opinion that "goods sold in the market" must necessarily mean "goods brought into the market and there sold;" otherwise he could not take the toll in specie; for the *gravamen* is, that the plaintiff was prevented taking his toll. The precedents also cited by the plaintiff, are strong to shew that "sold," as applied to a sale in a market, means a sale of goods which are in the market. Therefore I am of opinion that the motion to set aside the non-suit should be made absolute. And indeed if I doubted on this point, I should be inclined to send this case to be tried again in order that, if the defendant persisted in his objection, it might be put on the record either by tendering a bill of exceptions, or by a demurrer to evidence.

Rule absolute.

WILLIAMS v. PRITCHARD.

This was an action of Trover to recover goods distrained for the Land-Tax (under the Land-Tax Act, 27 Geo. III.) of a dwelling-house situate near Blackfriars Bridge, London, and built upon ground which was formerly part of the soil of the River Thames, embanked in pursuance of the Act of the 7th Geo. III. cap. 37. which enacts that "the ground and soil of the said river so to be inclosed and embanked in the front of every such respective wharf or ground should vest, and the same was thereby vested, in the owner or owners, proprietor or proprietors, of such adjoining wharf or ground, according to his, her, or their respective estates, trusts, or interests therein, *free from all taxes and assessments whatsoever.*"

It was contended on the part of the defendant that the Land-Tax Act was subsequent to that which exempted these houses from taxes; and also that the plaintiff being tenant only of the house, and not proprietor of the ground whereon it stood, was not within the indemnification of the 7 Geo. III.

LORD KENYON, Ch. J. delivered the opinion of the Court.

This question depends on the exposition of the statute 7 Geo. III. cap. 37. "for completing the bridge, *and the*

river Thames, &c." the 51st section of which (after enabling private persons to enclose and embank at their own expence, under the direction of the Mayor, &c. of London) enacts, that the ground and soil of the said river so to be inclosed and embanked in the front of every such respective wharf or ground should vest, and the same was thereby vested, in the owner or owners, proprietor or proprietors, of such adjoining wharf or ground, according to his, her, or their respective estates, trusts, or interests therein, free from all taxes and assessments whatsoever. And the question is, Whether this house, which has been built on soil recovered from the river, be liable to be assessed to the Land-Tax, levied under an Act passed *since* that time? It cannot be contended that a subsequent Act of Parliament will not controul the provisions of a prior statute, if it were intended to have that operation; but there are several cases in the books to shew, that where the intention of the Legislature was apparent, that the subsequent Act should not have such an operation there, even though the words of such statute, taken strictly and grammatically, would repeal a former Act, the Courts of Law, judging for the benefit of the subject, have held that they ought not to receive such a construction. In *Bro. tit. "Parliament,"* 52. is this passage: "Where a statute is that the merchant shall import bullion of two marks for every sack of wool exported, and then another statute was made that the merchant should not be charged unless for the ancient custom only, this does not repeal the first statute; *Vi. causam, ib. 4 Ed. 4. 12.*" And the reason is that it clearly was not the intention of the Legislature that it should have that effect. So here, though (strictly speaking) the Land-Tax is an annual statute, and the words of the Land-Tax Act, which was passed in the 27th year of this reign, are general and sufficiently large to subject these lands to the payment of the tax in question, yet, as the Land-Tax is one of the ways and means for raising the supplies every year, and is now become part of the constant resources of the country, the Legislature, in passing the 27 Geo. III. could not intend to repeal the provisions of the 7th Geo. III. which exempted these lands from the Land-Tax. Considering then that the Legislature did not mean to repeal this part of the 7 Geo. III. considering also that this precise question has been already determined, we think ourselves warranted in saying that the plaintiff is not liable to be assessed to the Land-Tax in respect of his house.

Postea to the Plaintiff.

EDDINGTON v. BORMAN.

This was a Case similar to the former, reserved at the Trial for the opinion of the Court on the following

C A S E.

The plaintiff is an inhabitant and occupier of a dwelling-house, situate in the parish of St. Anne, Blackfriars, in the Ward of Farringdon Within, in the City of London, which stands on the ground which was formerly part of the ground and soil of the river Thames, enclosed and embanked in pursuance of, and paying the quit-rent imposed by, the A& of the 7th Geo. III. cap. 37; which house was built thereon after the making of the said embankment. The defendant regularly distrained the plaintiff's goods for not paying a rate made under the 11th Geo. III. cap. 29. for paving, cleansing, and lighting the streets. The former occupier of the plaintiff's house, which was occupied only for a short time before the year 1788, was assessed to and paid the Poor's-Rate, as also the House-Tax, Commutation-Tax, Consolidated-Rate, Church-Rate, Tythes, Watch, and Orphan's-Tax: and the present occupier has, in like manner, been assessed to, but has resisted the payment of, all such rates, upon the ground of his being exempt therefrom by the 7 Geo. III. cap. 37. The plaintiff's house has been regularly assessed to the Land-Tax, but the payment thereof has been resisted, and is now in litigation. The street, place, or square, in which the plaintiff's house is situate, has been regularly paved, cleaned, and lighted by the Commissioners under the authority of the A& of the 11 Geo. III.

LORD KENYON, Ch. J.—This question seems concluded by the last case. In that the difficulty arose from the circumstance of the Land-Tax being an annual A&, and that the A&, under which the distress was taken, was passed subsequent to the statute containing the exemption. But the present A& of Parliament, in describing the persons who are liable to be rated, refers to the Poor-Rates, which have existed ever since Elizabeth's time, as well as to the Land-

Tax. Nor is there any foundation for the argument, that the occupiers of houses are liable, though the lands be exempted. The statute 7 Geo. III. cap. 37, enacts, that the lands to be enclosed and embanked, shall vest in the owner, &c. "*free from all taxes and assessments whatsoever.*" If then the lands themselves be exempted, so must also the houses built thereon.

Postea to the Plaintiff.

ECKERSALL v. BRIGGS.

This was a question, Whether the *owner* of stables in the parish of Marybone, rented by the Colonel of a Troop of Horse, by the authority of the King, for the use of the Troop, is liable to be assessed for them to the Paving-Rate in that parish?

C A S E.

By indenture of lease, dated 22d of September, 1787, between the plaintiff of the one part, and the Marquis of Lothian, Captain and Colonel of his Majesty's First Regiment of Life-Guards, of the other part, (reciting that his Majesty, by his sign manual, had been pleased to direct and authorise the Marquis of Lothian, *on his Majesty's behalf*, to accept and take a lease of the stables, riding-house, and premises thereafter mentioned, for twenty-one years), the plaintiff demised all those stables and riding-house then and now occupied by his Majesty's First Regiment of Horse-Guards, situate on the East side of Portman Street, Marybone, with the appurtenances, *To hold to Lord Lothian and the Captain and Colonel of the Troop for the time being* for twenty-one years, at the yearly rent of £.273 11s. 9d. payable to the plaintiff quarterly, clear of all taxes, rates, charges, and assessments, then charged, or at any time thereafter to be charged, on the said stables, or on the rent, or on the plaintiff in respect thereof, or on Lord Lothian, or any other Colonel of the regiment for the time being, in respect of the premises by authority of Parliament or otherwise howsoever: and the Marquis covenanted to pay all the said

taxes, rates, and assessments. The horses belonging to the Troop are kept in the stables and riding-house, and are attended and taken care of by the soldiers of the regiment : no person resides at the stables, nor is there any room or apartment therein for any such purpose ; but a corporal's guard of four men belonging to the regiment sits up with the horses during the night. The rent of the stables is paid by the Agent of the regiment out of the money voted by Parliament for army services ; the fund allowed for the regiment is accounted for by the Colonel ; and if any saving arise from the regiment not having their full complement of men, or of horses, such saving reverts back to the public, and is applied in payment of army services. The plaintiff was rated and assessed at 22*l.* 3*s.* 7*d.* by the Commissioners for putting in execution a certain Act of the 10th of Geo. III. cap. 23, intituled, " An Act for the more effectual paving, repairing, &c. the Streets, &c. within the parish of Marybone," *as the owner of the said stables and riding-house*, for and towards the purposes of paving, &c. for one year, ending the 31st of December, 1788. The plaintiff refused to pay his rate ; and the defendant, who is a collector of the rate, by virtue of a warrant under the hands and seals of two Justices, &c. took the goods in the declaration mentioned. The question for the opinion of the Court is, Whether the plaintiff be liable to pay the rate under the Act of Parliament ?

By § 93, it is enacted, " that one or more rate or assessment shall, for the purpose of repairing, &c. the streets, &c. be made upon all and every person and persons who do or shall inhabit, use, *occupy*, possess, or enjoy, any land, ground, house, shop, warehouse, coach-house, *stable*, cellar, vault, building, *tenement*, or hereditament, in any of the said squares, streets, &c." By § 105, " Inasmuch as it is reasonable that all *public buildings*, and all dead walls, and void spaces of ground, shall be rated and assessed in a due proportion towards the paving, &c. it is hereby further enacted, that it shall and may be lawful to and for the said Commissioners, at their discretion, and they are hereby required, from time to time, to rate and assess towards the purposes of this Act, all parish churches, and parochial and other chapels, schools, markets, *warehouses*, and all other *public buildings whatsoever*, charged or not charged to the Land-Tax, situate, &c. in any square, &c. within the limits aforesaid, which now is or are, or hereafter may be, built or in building, at a rate not exceeding, &c." " And [after directing that the churchwardens shall be rated for parish churches]

the rate or rates, assessment, or assessments, to be made and paid for any other chapel, meeting-house, school, market, warehouse, or other public building, dead wall, or void space of ground, shall be paid by the respective *owner or owners, proprietor or proprietors* thereof, and shall be charged and chargeable on the said premises, and be recovered and applied in such manner as other rates and assessments are directed to be recovered and applied by this Act."

LORD KENYON, Ch. J.—The words in the first clause, and which expressly charge the *occupiers* with this rate, are to be sure extremely general, and would comprehend all sorts of landed property were they not restrained by the subsequent provisions of the Act; for they mention "land, ground, house, shop, warehouse, coach house, stable, cellar, vault, building, *tenement or hereditament*." But as it was intended to impose the rate on every species of landed property within this district, and as it was foreseen that difficulties would arise in many instances respecting the persons who could be said to occupy particular buildings, the Legislature, in order to obviate such difficulties, provided, by the subsequent clause, that the rates on chapels, *warehouses, and other public buildings*, should be paid by the *owners or proprietors*. The question then is, What is meant by *public buildings*? and that may be answered by saying, that those are public which are applied to *public purposes*. A warehouse may be rated to the proprietor, or the occupier, according to the use to which it is applied. If it be let, for instance, to the Excise or Custom House for public purposes, the burden must be borne by the proprietor; but if it be afterwards converted to a private use, the occupier of it will be liable to this rate. So here the stables in question are used for a *public purpose* by the Horse Guards, in contradistinction to *private occupation*; and as long as they continue to be used for this purpose, there is no private occupier of them. On this ground proceeded the case of Lord *Anherst* v. Lord *Sammers* (with which decision I perfectly coincide), where Lord *Anherst*, as Colonel of the Second Troop of Horse Guards, was held to be exempt from the payment of the Poor-Rate imposed upon some stables occupied by the horses belonging to the Troop. Lord *Anherst* could not in any sense be considered as the occupier, so as to be liable to be rated, neither could the soldiers. So here, whilst these stables continue to be used by the Guards, they cannot be considered to be in the *private occupation* of any one, but are *public buildings* within the meaning of the latter section of the Act. And that clause cannot be confined

(as has been contended) to subjects not enumerated in the former one; because then it would have no operation whatever, since the former section mentions "hereditaments," which includes every species of landed property.

ASHHURST, J.—It clearly was the intention of the Legislature, when this Act of Parliament was framed, that no real property within this district should be exempted from the rates imposed by it. The property must be charged to some person or other. If it be occupied by *private persons*, the rate must be paid by the *occupier*; if converted to a *public purpose*, by the *proprietor*. But the same buildings, which have been occupied by private persons, may become public buildings within the meaning of this Act of Parliament, from the kind of occupation. Now here Lord *Lothian* cannot be considered as the occupier of these stables, because they are converted to a public purpose; then it follows that, as these buildings are liable in the hands of some person, the *onus* must fall on the proprietor, by the latter section of the statute: if they should hereafter be in private occupation, the rates must again be paid by the occupier.

BULLER, J.—I confess that, when I first read this case, it struck me in a different light: I thought that the words in the latter clause meant *buildings which were in their nature public*; and that "all other public buildings" following "chapels, &c." meant buildings *ejusdem generis*. But I now think that the construction which has been put on the statute is the true one; and that whether a building shall be considered as public or private, must depend on *the use* to which it is applied. The observation which my Lord has made on the term "warehouse," seems decisive.

GROSE, J.—The ground upon which we decided the case of Lord *Amherst* v. Lord *Sommers*, was, that the stables were considered as the stables of the public. Now in this case the Legislature intended that the proprietors of buildings, which are used by the public, should pay all rates imposed on them by virtue of this Act: and they have expressly charged such proprietors by the latter section.

Postea to the Defendant.

DERISLEY v. CUSTANCE.

This was an action on a covenant in a lease for quiet enjoyment, tried before Lord *Loughborough* at the Norwich Assizes. The declaration stated, that the defendant's ancestors granted the lease in question, alledged that *the reversion came to and vested in the defendant by assignment thereof*. The defendant pleaded by his guardian that the reversion did not come to and vest in him *modo et formâ*, as stated in the declaration. At the Trial it appeared the estate *descended* to the defendant, an infant, as heir at law to the lessors, his father and grandfather; that a person had been employed by the defendant's mother to receive the rents of the estate, which he had accordingly done, expressing in his receipts that *he received the rents for the defendant as landlord*; and that the mother herself had received one year's rent, and had given a receipt for the same to the plaintiffs *as tenants to her son*, mentioning that *it was received for her son's use*. On this evidence it was objected, first, that the receipt of rent was the act of the defendant's mother, and could not prove a possession in the infant, to subject him to an action of covenant; secondly, that the evidence shewed that the reversion vested in him by *descent*, and not by *assignment*; and, had the declaration charged defendant as heir, the parole would have demurred. And the learned Judge, being of opinion with the defendant on both objections, non-suited the plaintiffs. And the question now before the Court was, Whether the nonsuit should not be set aside?

LORD KENYON was absent.

ASHHURST J.—As the plaintiffs cannot be supposed to be cognisant of the defendant's title, it was sufficient for them to alledge in their declaration that he was *the assignee*, without shewing *quo jure* he was such; it is the common mode of pleading. Then the question is, Whether the circumstance of the defendant's being an infant will vary this case? In this stage of the cause I think it does not. This being an action of covenant, it was not competent to the defendant to plead his infancy *in bar* to the action; if he had wished to avail himself of his infancy, he should have pleaded

pleaded that the estate did not come to him by assignment, but as heir at law, and have prayed the parole to demur: but he has waved that advantage; the infancy was not pleaded, and it was insisted on at the trial as a ground of non-suit but that cannot be supported.

BULLER, J.—The difficulty at the trial seems to have arisen from the defendant's counsel having recourse to a nicety of law, which is not frequently heard of in modern practice, and which the other side were not prepared to answer: but no authority has been cited to shew that the question of parole demurer can arise at *Nisi Prius*. Now it is clear that the defendant's infancy in this case is not a matter of bar to the action; and the infancy was not put in issue; it formed no part of the issue on this record. Then it is strange to say that a fact, which in itself is not a bar to the action, and which is not put in issue at all, shall be permitted to avail the defendant at the trial on an issue in which he has joined, so as to form the ground of a non-suit. If the defendant had intended to take advantage of his infancy, he should have done it before he pleaded; for it is a dilatory plea, and does not go to the merits; it only suspends the proceedings. I see no objection to the plea suggested by my brother *Ashurst*, supposing the defendant could have taken advantage of his heirship on this declaration, which charges him as assignee: he might have pleaded that the estate came to him as heir at law, and that he was an infant, traversing that it came to him by assignment: that would indeed be tendering an issue in the words of the declaration on the inducement, but which might be material on a different ground; if therefore the plaintiff with that inducement would have joined issue on that fact, it would have become material to enquire whether or not the defendant were an infant: but, as the record now stands, it is perfectly indifferent whether the defendant be an infant or an adult. Then the question is, Whether, as between adults, there be any objection arising from the evidence to this declaration against the defendant, charging him as assignee, when, in fact, he was heir? It is sufficient to prove the substance of the issue, which is in this case that the defendant is clothed with such a character as will make him liable on the covenant; and that was sufficiently proved by shewing that the estate was vested in him. For whether he were in possession as assignee, or heir at law, he was equally liable on this covenant; and liable on the general allegation of his being assignee.

GROSE, J.—The only question on this record was, Whether or not the premises came to the defendant by assignment? The objection was, that they descended to him as heir; now if he were the heir at law, and entered into the premises, he was such an assignee as makes him liable in action.

Rule absolute.

REX v. MAYOR OF LONDON.

A barge-way and toll-gate belonging to the City of London, at Hampton-Wick, Middlesex, was rated to the poor. The Sessions, on appeal, confirmed the rate, subject to the opinion of the Court on the following

C A S E.

Hampton-Wick is a vill, maintaining its own poor. The appellants, by virtue of the stat. 17 Geo. III. cap. 18, and out of the fund provided by that Act, purchased from Sir William Dolben, for the sum of £.4200, an ancient barge-way or towing-path within the said hamlet, upon the bank of the Thames, and certain ancient tolls and duties, payable in respect of horses drawing barges along the same; and such barge-ways and tolls were, in January 1778, conveyed to the appellants for the purposes of the Act. The appellants have leased the herbage and pasture of the barge-way, or towing path, to Mr. Spencer, at an annual rent of 30*l.* 10*s.* 0*d.* which is expressly appropriated to the use of the navigation: and their lessee is in the occupation of the herbage and pasture so leased to him, and pays the several rates for the same. Immediately on the purchase and conveyance, the tolls upon barge-horses were, in pursuance of the direction of the Act, discontinued, and ever since that time the new tolls, authorized by the statute to be collected in lieu thereof, have been taken by the appellants for all barges and other vessels navigating the river between London-bridge and the City Stone above Staines-bridge, according to the quantity of tonnage. Barges and other vessels

sels are daily navigated on that part of the Thames which is within the hamlet, and adjoins the barge-way; and, under the authority of the Act, an additional toll of one half-penny *per* ton becomes payable, and is paid to the appellants for every barge or other vessel navigating upon the river beyond Kingston or Hampton-Wick, and towed along the barge-way to Ditton, Hampton-Court, Moulsey, or Hampton, within part of which limits the barge-way in question is included; and barges from London frequently stop and unload within the limits of the barge-way. None of the new tolls are actually received within the hamlet of Hampton-Wick; but the whole of them collected by the appellants' appointment at Strand-on-the-Green, below Kew-Bridge. Sir William Dolben and his ancestors, previous to the above purchase and conveyance, were alway assessed to the Land-Tax, Poor's-Rate, and other taxes for the barge-way and ancient tolls, and constantly paid all such assessments up to the time of such purchase and conveyance; and from the time of such purchase and conveyance, the appellants have been regularly assessed in respect of the barge-way and tonnage; and the Land-Tax and Poor's-Rate have been several times demanded by the officers of the hamlet, but the appellants have never paid the same. The whole interest which the appellants have in the tolls is derived under the before-mentioned Act, and purchased under the authority thereof. And the rates appealed against have been duly made, allowed, and published according to law.

The Act of the 17th Geo. III cap. 18, is entitled "An Act for enabling the Mayor, &c. of London to purchase the present Tolls and Duties payable for navigating upon the River Thames, Westward of London Bridge, within the Liberties of the City of London, and for laying a small Toll in lieu thereof, for the Purpose of more effectually completing the said Navigation; and for other Purposes." The Act states, that great expences had been already incurred by the City for improving the navigation under the 14th Geo. III.; that further sums of money were necessary to be laid out, over and above the annual expences; and it enables them to purchase lands and the several tolls and duties collected for the navigation of barges, and for horses drawing the same: that, immediately after the purchase of such tolls and duties, those tolls and duties should cease; and then it enacts, that, "in consideration of the great charges and expences the said Mayor, &c. will be at in improving and completing the said navigation, and for keeping the works in re-

pair.

pair, and in purchasing the tolls and duties now collected and taken for barges and other vessels navigating, and for horses drawing, &c. it shall and may be lawful to and for the Mayor, &c. to take for all barges, &c. which shall be navigated upon the said river between London Bridge and the City Stone above Staines Bridge (except as is hereinafter mentioned), such sums of money, in the nature of a toll or duty, as the said Mayor, &c. shall think proper, not exceeding the tolls and duties hereinafter mentioned." It then stated the tolls which might be taken from London Bridge to several other places up the river as far as Staines, amongst others to Hampton-Wick, *2d. per ton*; to Staines and upwards, *4d. per ton*. It also gives the City power to collect the tolls where they please. It then requires, that "*an account of the said Tolls and Duties granted by the Act be annually laid before Parliament.*" It then recites, that the money to be collected by the receipt of the tolls or duties, to be made payable by virtue of this Act, will not be sufficient for the purpose of the Act, and of the 14 Geo. III. &c.; and then gives power to the city to raise money upon the security of the tolls.

LORD KENYON, Ch. J.—From the time when I first read this case, to the present moment, I confess I have had no doubt on this question. It appears that, some years ago, Sir W. Dolben was seized of a close called *The Barge-way*, and from persons who passed over it he received tolls: it afterwards became necessary for the City of London, as conservators of the river Thames, to get possession of this barge-way, lying in Hampton-Wick; and accordingly they acquired the ownership and possession of this land, by virtue of the Act of Parliament, 17 Geo. III. cap. 18. It seems to me that the difficulty which has been made has arisen not considering *what* is rated; it is not a rate on the tolls, but the close of land, called *The Barge-way* and the *Toll-gate*. Now the questions are, first, Whether this property be or be not rateable? And, 2dly, Who should be rated for it? First, the subject matter of the land is real property; it is land, tenement, or hereditament; and it is liable to be rated, unless it be so circumstanced, that there is no occupier on whom the rate can be imposed; as in *Lord Amherst v. Lord Sommers*, the case of *St. Luke's Hospital*, &c. But here the City of London are the occupiers; for the case expressly states, that Spencer's interest is confined to the herbage and pasture; and therefore if any injury were done to the soil, the defendants might maintain trespass for it.

••• here

Where there is no actual possession in another person, the possession follows the property. It is not necessary that there should be a manual occupation every day; as in the instance of the waste of a manor, for injuries done to which, the Lord of the Manor may bring trespass. And in this case there is no doubt but that the City of London are in the actual occupation of this property, for persons navigating on the river pay them for the right of passing along the towing path. It is not necessary for us to say how much the City should be taxed in one parish, and how much in another; it is sufficient for us to say, that they have the inheritance and ownership of the soil which is the subject matter of the rate: if they be rated too much, their remedy is by appeal to the Sessions.

BULLER, J. after observing that the thing rated was the barge-way and toll-gate, said, that there were two questions; the one, Whether the thing rated be or be not in its nature liable to be rated to the poor? The other, Whether it be exempted on account of the use to which it is applied? With respect to the former; it is an interest in the soil, being in Hampton-Wick, in respect of which they take tolls, some of them payable in that district, and some in other parts. It is not necessary for us to determine whether they be liable to be called on in this district for a proportion of the tolls arising on one entire voyage from London to Staines; it is sufficient, for the decision of this case, that some of the tolls are due for navigating to Hampton-Wick. If tolls were to be divided for the purpose of rating them in different parishes, it would create great confusion; but it has been settled in a variety of cases, particularly in *Rex v. The Aire and Calder Navigation*, and *Rex v. Cardigan*, that the party is to be rated for tolls where they become due. The Court, in deciding those cases, proceeded on the principle that the owners were not entitled to receive the tolls till the vessels arrived at a certain place; and where those tolls are due, there the party is rateable. It is immaterial in what place they are received; for if, in this case, the defendants received them at Guildhall, they could not be rated for them in London, but at Hampton-Wick, where they become due. As to the other question; the defendants are in possession of this property, and are therefore *prima facie* liable to be rated for it; if they be entitled to any exemption, it is incumbent on them to shew it. Now it has been objected, that they are not liable to this rate, because they hold it on a public trust: but, in the first place, it does not ap-

pear to be the case of a trust at all; and, if it did, perhaps the consequence contended for would not necessarily follow. Before this Act of Parliament passed, the defendants were the conservators of the river Thames: now we are not sufficiently informed, by this case, whether they were or were not under any obligation to cleanse and repair the river; and, if they were, this Act was passed in ease of their burden: but whether they were or not is perfectly immaterial, for they are found in possession of this property which is rateable, and it is not stated negatively that they are not the *beneficial* owners of it.

GROSE, J.—The question before us is not whether or not the City of London be rated too high, but whether they be properly rated for that which is the subject of the rate. Now, the rate is on the barge-way and toll-gate; and it appears from the case that the soil is in the defendants, and not leased out, as it was in *Rex v. Jolliffe*: the soil therefore remaining in them, they are properly assessed for it. Then is the City of London rateable in this district; it is stated in the case, that *2d. per ton* is due for goods landed at Hampton-Wick; something therefore is rateable to the poor in this place; and, if we were to determine that the defendants are not liable for that in Hampton-Wick, we should in effect overturn the case of *Rex v. Cardington*. The remaining question is, Whether the City of London be trustees of this property for the benefit of the public? On this, I confess, I had some doubt at first; but the manner in which my brother *Buller* has put this question removes all difficulty; for, finding the defendants in possession of some property, and that property rateable, they should have shewn that they were trustees for the public: not having done so, they must be rated for it.

Order of Sessions confirmed.

OLD BAILEY, 1791.

The TRIAL of LORD VISCOUNT DUNGARVAN.

Counsel for the Prosecution.

Mr. Knowles and Mr. Const.

For the Prisoner,

Mr. Shepherd and Mr. Garrow.

Edmund Boyle, Esq. otherwise called Viscount Dungarvan, of the Kingdom of Ireland, was indicted for that he, on Wednesday the 12th of January, 1791, at the parish of St. Giles in the Fields, did unlawfully and feloniously take from Elizabeth Weldon, spinster, Three Guineas and a Half privately from her person.

Elizabeth Weldon sworn.

Examined by Mr. Const.

Q. Pray, Madam, did you go to the Play any day last week?

A. I went to Covent Garden Theatre, and sat in one of the front boxes, on Wednesday last.

Q. Did you see Lord Dungarvan there?

A. I did. He asked me, if I would permit him to see me home. He got into a coach, and I got in after him.

Q. What happened after you got into the coach?

A. I put my hand into my pocket, to give the link-boy some money, but found I had no silver; I had only in my pocket three guineas and a half in gold, a large key, and a thimble. He came and sat on my right side, and I felt his hand about my pocket-hole, and then immediately put his arm around my waist. I asked him what he was about and told him not to do so, or words to that effect. He immediately went and sat opposite to me; I perceived him feeling about his waistcoat-pocket, which gave me some suspicion that he had picked my pocket; and, on examining, my money was gone.

Q. Did you accuse him, immediately after you missed your money, of picking your pocket?

A. No, I did not; I was afraid he would knock me down in the coach, and run away.

Q. When did you first accuse him of picking your pocket?

A. Immediately after the coach stopped.

Q. What did he say?

A. He made no answer, but offered me a guinea. He said, here is a guinea, if you will let me go.

Q. What answer did you make to this?

A. I told him he had picked my pocket, and that I would not let him go.

Q. What happened after this?

A. He got out of the coach, and ran away. I ran after him, and called out "Stop thief." The watchman was coming up the street, on the same side of the way on which Lord Dungarvan was. He stopped, and the watchman laid hold of his collar. I said, that gentleman has picked my pocket; and I desire you will take him to the watch-house, which he did.

Q. When the coach stopped at your door, did any of the servants open it?

A. Yes, Sir, one of my servants came to the door, and saw me before I got out of the coach.

Q. Pray, Mrs. Weldon, will you tell my Lord and the Jury precisely how much money you had in your pocket, when you went to the play?

A. When I went out of my own house, I had half a crown, a shilling, and three guineas and a half in gold.

Q. How do you know that was the exact sum?

A. Because, before I went out, I took it out of my pocket, and looked at it; I had received it from one of my servants, about an hour before I went to the Play, to pay a bill, but did not pay it.

Cross-examined by Mr. Shepherd.

Q. Now, Mrs. Weldon, in the first place, let me ask you what is your true name?

A. Sir, Elizabeth Weldon is my name.

Q. Have you never gone by any other name?

A. I have gone by the name of Troughton.

Q. Well, my good lady, tell us what other names you have gone by?

A. 1

A. I once went by the name of Smith. When I came to London, my name was Weldon; I then changed it for the name of Smith; then Weldon; then I took the name of Troughton, and since that of Weldon.

Q. Pray, Madam, within what time may all these changes of names have taken place?

A. I have been in London above two years.

Q. What name did you write when you signed your information taken before Justice Reid?

A. I did not write my name, but signed it Weldon.

Q. How could you sign it without writing it?

A. I made a mark.

Q. Now, my good Lady, answer me one question. How do you distinguish the mark which stands for Weldon, from the mark which you make for Troughton and also from that which stands for Smith?

A. I do not write at all. One of my servants writes for me.

Q. What is that servant's name?

A. Mrs. Astell.

Q. Now, Mrs. Weldon, do you mean to swear, that Mrs. Astell is no more than a servant?

A. I do; she comes to work for me all sorts of work, and I pay her.

Q. Where does she live?

A. At Islington. She is a married woman.

Q. Now, woman, upon your oath, is not Mrs. Astell your own sister?

A. She is.

Q. Were you perfectly sober when this happened?

A. I was. I had only drank three glasses of claret.

Q. You then drank three glasses of claret on the 12th, and made your mark before the Justice on the 13th. How long have you lived in Rathbone Place?

A. Since the 6th of August last.

Q. Where before that?

A. Before that I lived in Howland Street; before that in Charles Street; before that in Suffolk Street; before that in Bream's Buildings.

Q. Where before that?

A. In East Harding Street.

Q. Now, Madam, I should be glad to know how many times you were at the play in the week when you lost your money?

A. I cannot tell how many nights.

Q. Will you tell us, Mrs. Weldon, how many strange gentlemen have gone home with you this season from the Play?

A. Very few, but there have been some.

Q. On the night after you lost your money, did not you go from the Play into the Rose Tavern with a gentleman?

A. I did.

Q. Why did you go into the tavern with this gentleman?

A. To tell him how ill I had been treated the night before.

Q. Now, upon your oath, Madam, did you receive no money from that gentleman that night?

A. I received two guineas.

Q. Did nothing pass that night as a consideration for those two guineas.

A. Nothing.

Q. When did you first see my Lord Dungarvan, on the night he went home with you?

A. His Lordship came and sat by me in the front boxes.

Q. At what time did you and he go out of the Play-house?

A. We went out before the Farce was over; he proposed to go home with me, and I consented.

Q. Who got into the coach first?

A. Lord Dungarvan did, and I followed him.

Q. Was there not a great confusion, bustle, and pushing about when you went into the coach?

A. There might be a pushing about when I went into the coach; I cannot say there was any dispute with any body; a woman pushed me, and I asked her why she did so; I made a blow at somebody. There was no confusion at the coach door.

Q. Did you tell the Justice that there was?

A. I told all to the Justice that he asked me; I told him there was no disturbance, and nobody by when I got into the coach but the link-boy.

Q. When was it, did you say, that you perceived your money was gone?

A. When I had got about half way home.

Q. What induced you to search your pockets then?

A. I saw the gentleman fumbling about his waistcoat-pockets, which created some suspicion, and led me to put my hand into my pocket, to see that my money was safe.

before he said he would

A. I did ; I told
would call out stop this
I would not.

Q. Was this before

A. After.

Q. How many set

A. Two, Sarah F
Thomas my footman.

Q. When you was
you all to go into the

A. Mr. Reid told u
it over.

Q. Did not either
would make it up?

A. Neither the Just
up, to the best of m
Dungarvan's Attorney
settle it.

Q. Did not the Just

A. He asked me sev

Q. Did not you inf
Shepherd and his friend

A. I did not, but w
they desired me.

Q. Upon your oath

Q. Are you acquainted with the Justice's son?

A. He came to my house with the Bill of Indictment.

Q. When was that, Mrs. Weldon?

A. It was on the same day.

Q. Was the Justice's son, the young Mr. Reid, your Attorney?

A. He was not.

Q. Did he come by himself, or in company with any other person?

A. He came along with the Justice's Clerk.

Q. I suppose, Madam, you know that this bill is for a capital offence?

A. I do.

Examined by Mr. BARON THOMPSON.

Q. Pray, Madam, was this money loose in your pocket?

A. Yes, my Lord, it was; both gold and silver.

Q. Were the key and thimble in the same pocket?

A. They were.

Q. Were they all lost at the same time?

A. They were.

Q. Was the key or the thimble ever found again?

A. Never, my Lord.

Q. I think you said you had accused him of picking your pocket before he offered to give you a guinea to let him go?

A. I had.

Q. When you told the coachman he was going wrong, did you hint to him that you had lost your money?

A. I did not.

Re-examined by Mr. Shepherd.

Q. Mrs. Weldon, had you not at this time two gold watches hanging at your sides?

A. I had.

Q. What did you say respecting those watches at the watch-house?

A. I said I was very happy my watches were not gone.

Q. What did you say of Lord Dungarvan at the watch-house? Did not you say that he was a little dirty black-guard; and that if Barrington was not in Newgate, you should have taken him for him?

A. I did not.

Sarah Riley sworn.

Q. I believe you live at Mrs. Weldon's, N^o 45, Rathbone Place?

A. Yes, Sir.

Q. Do you know how much money your mistress had in her pocket last Wednesday evening when she went to the Play?

A. She had three guineas and a half in gold; and half a crown and one shilling in silver; I fetched it her some time that day.

Q. At what hour did she leave her house that evening?

A. Between eight and nine o'clock.

Q. Where was you when the coachman knocked at the door?

A. I was down in the kitchen, and heard my mistress hollow out "Stop thief!" three times.

Q. What did you do upon hearing this?

A. Upon hearing this, I ran up.

Q. What did you see?

A. I saw the gentleman whom she charged, and a watchman had hold of him.

Q. Did you go to the watch-house?

A. I followed him to the watch-house, and went in.

Q. Was the gentleman searched?

A. He was not, while I was there.

Q. Did you hear your mistress make any charge against him in the watch-house?

A. She said he had picked her pockets.

Cross examined by Mr. Garrow.

Q. Now, Mrs. Riley, in what capacity do you live with Mrs. Weldon?

A. As lady's maid.

Q. And I think she told us she has one footman.

A. She has.

Q. You told us you fetched three guineas and a half for your mistress last Wednesday before she went to the Play; pray where did you get that money?

A. I got it in a drawer in my mistress's own house.

Q. Did you usually keep the key of the drawer?

A. I did.

Q. When you took out the three guineas and a half, how much money did you leave behind?

A. Th

A. There was more money, but I do not know how much.

Q. When you delivered this money to your mistress, what did she do with it?

A. She separated the gold and silver; she put the gold into one of her pockets, and kept the silver in her hand.

Q. I suppose your mistress was very smart; she had no cloak nor bonnet?

A. No, Sir.

Q. I suppose she always rides home?

A. She does, Sir.

Q. If she was to bring home a strange gentleman with her, I suppose you would not be surprized at it?

A. No, Sir.

Q. Upon your oath, woman, is not she as notorious a prostitute as any person in the street in which she lives?

A. She is not so notorious as any person in the street.

Q. Now, Mrs. Riley, where did you come from, when you came to live with your mistress?

A. Out of Derbyshire.

Q. Did you know your mistress, when you lived there?

A. I did.

Q. Who recommended you to her?

A. Nobody.

Q. Is not Mrs. Weldon your own sister?

A. She is.

Q. Does not Mrs. Astell, who is another of your sisters, do work for your mistress, sew and write some fine things for her?

A. My mistress cannot write, and Mrs. Astell writes her letters for her.

Q. How much money did your mistress carry with her to the play on the Thursday night?

A. I do not know.

Q. Did any body dine with your mistress on the Wednesday before she went to the play?

A. A lady dined with her.

Q. Where did you come from, when you came to London?

A. I came from my parents: Mrs. Astell sent for me.

Q. And you have ever since lived on the prostitution of your other sister, Mrs. Weldon?

No answer.

Rebecca Lickman examined by Mr. Const.

Q. Pray do you remember any thing at your mistress's house on Wednesday last?

A. I

A. I saw a gentleman with my mistress in a hackney-coach; I saw the coach door opened, and the gentleman knocked my mistress back, jumped out, and ran away; my mistress then called out "Stop thief!" The gentleman then made a stop.

Edward Spink, examined by Mr. Knowles.

I am the watchman in Rathbone Place. In calling the hour of eleven, a lady called out Watch! I went up to the lady, and she had hold of a gentleman by the arm; she gave me charge of him to bring him into her house; I said, I durst not do any such thing; I asked her what he had done, and she said, he had robbed her; I then said, he must go to the watch-house.

Q. Did she say of what he had robbed her?

A. She did not; she called for her cloak and bonnet, and followed me to the watch-house.

D E F E N C E.

Thomas Brady sworn.

I am one of the linkmen of Covent Garden Theatre. On Wednesday the 12th instant I was at the door of the Play-house, about 11 o'clock at night. The lady asked me if I had seen her servant; I called out, but could not find him; and the lady ordered me to get a coach. After some minutes, the lady and gentleman came with me through the crowd. The gentleman got into the coach first, and in turning back to bring the lady, I saw a woman who seemed to be taking great care of her, and was holding her umbrella over her head; several persons were about her, and crowded so she could not get cleverly away. She made a back-hand blow at some of them, but whether she struck them or not, I cannot tell. She then got into the coach to the gentleman, and I directed the coachman to drive to Rathbone Place.

Stephen Fleming sworn.

I am a hackney coachman. I was standing at Covent Garden, when a link man called a coach to Oxford Road. I then drove to Berners Street; and when I had got up that street about twenty doors, the lady let down the front glass of the coach, and asked me where I was going. I said, Madam, this is Berners Street. She said, I ordered you to Rathbone Place.

Q. When you came into Berners Street did she make any complaint that she had had her pockets picked?

A. She did not say a word upon the subject.

Q. If she had told you that the gentleman in the coach had picked her pocket, could you have secured him?

A. Most undoubtedly I could.

Q. When you came to Rathbone Place, what happened?

A. She ordered me to knock at the door, which I did, and the servant came immediately. I opened the coach door. The Gentleman and Lady spoke to each other so low, that I could not hear what they said. I saw the gentleman have his hand towards the lady, as if he was offering her something; and she rather drew back, as if to refuse what was offered. The first words I understood from her were, You shall. His answer was, I will not. The lady said, Damn my eyes, but you shall, Sir. The gentleman then put his left foot out of the coach on the step. I thought he wanted to shun her company. I imagined he had made a mistake, and did not like her. The lady kept hold of his arm with one hand, and, with the other, seized his breast or collar, and said, If you will not, I will charge the watch with you. The gentleman got out and left her in. She called, Watch! and the watchman came immediately. She said, I give you charge of this rascal, of that villain, for he has robbed me, he has picked my pocket, watchman, take him into my house.

Joseph Whiteman sworn.

Last Wednesday I was constable of the night, and I remember a gentleman being brought to our watch-house by the watchman. When the lady came, she said, that fellow has picked my pocket: the blackguard, I wonder he did not take my two watches. She then pulled up her apron and shewed me two gold watches that were hanging at her sides. She charged him with having picked her pocket of four guineas.

Q. Did the gentleman tell you who he was?

A. Not at first; but afterwards he told me he was Lord Dungarvan.

Mr. Shepherd, Solicitor to his Lordship, sworn.

Q. Mr. Shepherd, will you have the goodness to relate what you know of this business?

A. On Thursday last I went with Lord Dungarvan to Justice Reid's Office, and found Mrs. Weldon there, and two other women; after Mrs. Weldon had been examined, Mr. Reid, addressing himself to my Lord Dungarvan, said, "You see the woman is positive, what shall I do? I think you had all better adjourn into the next room, and talk the matter over among yourselves;" or words to that effect. Understanding what Mr. Reid said to tend to a
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compromise, with some degree of warmth I said, I cannot Mr. Reid, consent to any compromise, or any thing like a compromise of any sort whatever; nor can I advise my Lord Dungarvan to enter into any negotiation towards a compromise. Mr. John King, and others of his Lordship's friends, were present at the time: we told Mr. Reid, we should withdraw into the next room; but refusing any idea of a compromise under the most positive terms. The prosecutrix came into that room and I told her, "we had retired hither for the purpose of private business," and said, "I desire that you will withdraw." The prosecutrix then said, "that she had been ordered there by the Justice, and "that there she would stay," and accordingly sat herself down. I then desired the constable, to turn the woman out of the room. There was no sort of compromise made by me or Lord Dungarvan. The prosecutrix in her first examination did not say the coachman had driven her to Berners Street, but had driven her strait to Rathbone Place.

George Gibbons sworn.

Q. I believe, you attended Mr. Reid's Office on last Thursday Morning.

A. I did, Sir, and took down in writing the answers to several questions put to Mrs. Weldon, after the examination taken by the Magistrate was completed. The magistrate permitted Mr. Chambre to ask these questions, but would not permit them to be returned as part of his examination.

Mr. Chambre interrogated her as to the time when she first perceived that she had lost her money; to which she answered, I perceived that I had lost my money on offering to give the link-boy some gratuity, but did not charge Lord Dungarvan till I was half way home. This question and answer were read to the prosecutrix, and she was asked whether they were correct? her answer was, that they were correctly taken down.

Jury. We are satisfied.

Baron Thompson—I have been perfectly satisfied for a considerable time, but, as it was your province to say when you were satisfied, I did not chuse to interfere.

The Jury found the verdict NOT GUILTY.

Mr. Baron Thompson then addressed Lord Dungarvan in these words:

My Lord Dungarvan, it is but justice to you to say, that it is impossible for you to go from this bar with the least imputation on your character. Of the imprudence that brought you into the situation I say nothing, as you yourself seem to be perfectly sensible of it.

CROWN CASES.

EDWARD TUFT'S CASE.

At the Lent Assizes for the County of Leicester, 1777, *Edward Tuft* was tried before Mr. Justice *Nares*, for forging an indorsement on a Bill of Exchange. The Jury found the prisoner *Guilty*; but the learned and humane Judge, cautious of passing sentence of death in a case which admitted of doubt, submitted to the consideration of the TWELVE JUDGES, Whether, upon the following state of facts, the conviction was proper?

The Bill of Exchange was the property of one *William Wetheral*, out of whose pocket it had been picked or lost, with other things, at Leicester Races. The prisoner had the very same night 'endeavoured to negociate it at Leicester; but being disappointed, he proceeded to Market-Harborough, where he bought a horse of one *John Ingram*, the landlord of the inn, and offered him this bill to change. The landlord not having cash sufficient in the house, carried it to a banker's in the town, where the clerk told him that it was very good paper, for that he knew the payee who had indorsed it, and that if he (the landlord) would put his name on the back of it, it should be immediately discounted. The landlord, however, not knowing the person from whom he had received it, refused to indorse it; but told the clerk, that the gentleman was then at his house, and he would go and fetch him: accordingly he went to the prisoner, who accompanied him to the banker's. The clerk then told the prisoner, that it was the rule of their shop never to take a discount bill, unless the person offering such bill indorsed it; and therefore if he (the prisoner) would indorse it, it should be discounted. The prisoner immediately indorsed it by the name of "*John Williams*," which was not his own name, and the banker's clerk, after deducting the discount, gave him the cash for it. The prisoner, in his defence, said he had found it.

The JUDGES were unanimously of opinion, That this was a forgery; for although the fictitious signature was not necessary to his obtaining the money, and his intent in writing a false name was probably only done to conceal the hands through which the bill had passed, yet it was
a fraud

a fraud both on the owner of the bill, and on the person who discounted it. The one lost the chance of tracing his property, and the other lost the benefit of a real indorser, if, by accident, the prior indorsements should have failed.

ELLIOT'S CASE.

James Elliot was indicted at *Midstone Assizes* on 21st of July, 1777, for forging a Bank Note, with the name of *Thomas Thompson* thereunto subscribed, purporting to bear date the 20th of June, 1775, and to have been signed by one *Thomas Thompson*, for the Governor and Company of the Bank of England, for the payment of the sum of FIFTY POUNDS to Mr. *Joseph Crooke* or bearer, on demand; the tenor of which said Note is as followeth, *that is to say,*

“ N^o 17.73.— I promise to pay to Mr. *Joseph Crooke*, or bearer, on demand, the sum of FIFTY

“ £. FIFTY. LONDON, the 20th day of June, 1775.

“ For Gov^r. and Comp^y. of the Bank of England,
THO. THOMPSON.”

The second count charged it to be “ a certain note in the form of a Bank-Note.” The third count charged it to be “ a certain promissory note for the payment of money.” There were also other counts, in which the offence was charged to have been committed with an intention to defraud the Governor and Company of the Bank of England.

This indictment was admitted to be framed on the 31 *Geo. II. cap. 22*, which extends the subjects of forgery enumerated in the 2 *Geo. II. cap. 25*, to all corporations.

It appeared in evidence, that the prisoner had applied, under the fictitious name of *Pearce*, to one *Mary Smith*, who usually made the moulds for the Bank of England paper, to make him a pair of small moulds, finer than those which she made for the use of the Bank; but she refused to execute his order. That about two months previous to finding the indictment, the prisoner delivered to a Mr. *Robert Reyland*, a copper-plate printer, two copper-plates and a quantity of fine paper, desiring that he would strike off two dozen im-

pressions from each plate, the one of which was engraved for the sum of Twenty Pounds; the other for the sum of FIFTY POUNDS, both of them payable by the Governor and Company of the Bank of England. Mr. Keyland struck off the impressions, pursuant to the order, and re-delivered them, with the plates, to the prisoner. When the prisoner was apprehended; impressions of the above description were found upon him, and produced in Court, together with the copper-plates which had been found in consequence of information derived from him. Among the printed impressions found upon the person of the prisoner, was the forged instrument stated in the indictment. The plate from which it had been struck off was identified by Mr. Keyland; and the Officers of the Bank proved, that it was in every respect similar to a Bank-Note, except, *first*, that the number was not filled up: *secondly*, that the word POUNDS was omitted in the body of the note: *thirdly*, that the texture of the paper was rather thicker than that used by the Bank: and *fourthly*, that in the fabrick of it the water-mark, *viz.* the words BANK OF ENGLAND were not inserted: but they said, that a Bank-Note, with the like omission of the word POUNDS in the body of it, being regular in other respects, would be paid by the usage of the Bank, after it had passed the Examiner's office. A real Bank-Note of the same date and tenor, except as above excepted, was produced in evidence.

Mr. Morgan, the prisoner's Counsel, contended, *first*, That the word POUNDS being omitted in the body of the note, it was not a note for the payment of money; or if it was for the payment of money, it was totally uncertain what coin, whether pounds or shillings, and that upon such an uncertainty in a declaration, the plaintiff would be non-suited.

To this objection it was answered, That the tenor of the note imported a promise to pay *some money* by a Company whose peculiar traffic is in cash, and whether for pounds or shillings would make no difference in the offence.

Secondly, That this was no forgery upon the Corporation of the Bank of England, because the water-mark was omitted in the Note, which was essential to the Notes of the Company; and therefore it bore no resemblance to their Notes, and could not be a fraud upon them.

To this it was answered, That, whatever weight this objection might have upon the count for forging a Bank Note, it had none upon the count charging it to be a note for the payment of money. It was clearly to be paid by that

that corporation, and a fraud upon them. A counterfeit need not be a critical counterpart. If made *malâ fide* so similar as to have an aptness to impose, it is sufficient. The water-mark is not of the essence of a Bank-Note, since the Company are not obliged by any law to use it. They may drop it or use it as they see occasion. It is sufficient that the tenor of the note imports a promise from the corporation of the Bank to pay. The case of a forgery by one *Vaughan*, tried at O. B. in 1768, was cited, in which most of the letters of the water-mark were omitted in the substance of the paper; but as no authentic or accurate state of the case was produced, no stress was laid upon it.

The learned Judge left it with the Jury to consider whether the word FIFTY imported POUNDS; and the Jury found the prisoner *Guilty* upon the count which charged him with forging "a certain promissory note for the payment of money, with intention to defraud the Bank of England," and acquitted him of the rest of the indictment.

Mr. *Morgan*, the prisoner's Counsel, moved the following objections in arrest of judgment.

First, It is charged in the count upon which the prisoner is found *guilty*, to be a note for the payment of money; but in reciting the tenor of it, it appears to be for the payment of FIFTY, and does not say POUNDS. The recital therefore materially varies from the charge, by leaving out a description of the coin, whether pounds or shillings, for which the note purports to be drawn, and no other coin can be considered as money.

Secondly, That it cannot be with an intention to defraud the Governor and Company of the Bank of England. The 31 Geo. II. cap. 2. § 78, whereon the count upon which he is convicted is grounded, relates, and the other statutes relate to notes for the payment of money; but the tenor of the note set forth is not for the payment of money, and therefore not within them. The note produced in evidence appears intended to resemble a Bank-Note; but all Bank-Notes have the words BANK OF ENGLAND visible in the substance of the paper, and the count charges the intention to defraud the Bank. There is not the least appearance of the words BANK OF ENGLAND in the substance of the note and therefore does not resemble the notes of that corporation.

In Mich. Term, 18 Geo. III. the Judges, at Serjeants or Symond's Inn, were unanimously of opinion, That the verdict was legal.

ROWLAND RIDGELAY'S CASE.

This was a case upon the 8 and 9 *Will. III. cap. 26*, drawn up and reserved by Mr. Baron *Hotham*, at the Old Bailey in December Session, 1778, for the consideration of the Twelve Judges.

The indictment *first* counted, That the prisoner not being a person employed in or for the Mint, &c. knowingly, feloniously, and traitorously had in his custody and possession one PUNCHEON, made of iron and steel, in and upon which *was made and impressed* the figure, resemblance, and similitude of the head-side of A SHILLING, without any lawful authority or sufficient excuse for that purpose, against the duty of his allegiance, &c.

The *third* count was the same as the first, for having in his possession a puncheon, in and upon which was impressed the figure, resemblance, and similitude of the head side of A GUINEA.

The *second* and *fourth* counts respectively charged, that the said puncheon would *impress and make* the figure, resemblance, and similitude of the head-side of a *shilling*, and a *guinea*.

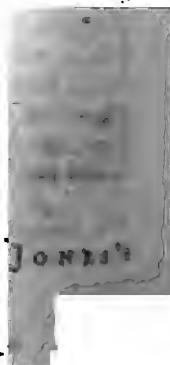
The words of the Act of Parliament, as far as they relate to this question, are, that whosoever "shall knowingly make or mend, or begin, or proceed to make or mend, or assist in the making or mending of any puncheon, counter-puncheon, matrix, stamp, die, pattern or mould, of steel, iron, silver, or other metal or metals, or of spaud, or of fine founders earth, or sand, or of any other materials whatsoever, in or upon which there shall be, or be made or impressed, or which will make or impress the figure, stamp, resemblance, or similitude of both or either of the sides or flats of any gold or silver coin current within this kingdom, &c. or shall knowingly buy, sell, hide or conceal, or without lawful authority or sufficient excuse for that purpose, knowingly have in his, her, or their houses, custody or possession, any such puncheon, counter-puncheon, matrix, stamp, die, or other tool or instrument before mentioned, every such offender or offenders, their counsellors, procurers, aiders, and abettors, shall be guilty of high treason."

It

It was fully proved that the puncheons were found in the prisoner's lodging, and that he had them knowingly for the purposes of coining. The Jury accordingly found a general verdict *Guilty*; but as no case had been decided upon this branch of the Act, the Court wished to have the opinion of the JUDGES upon the following evidence of the Engraver of the Mint, Whether these were or were not puncheons within the meaning of the Legislature?

"The puncheons found in the prisoner's custody are complete, and are hardened ready for use; but it is impossible to say that the shillings which were found, were actually made with these puncheons. The impressions are too faint to be exactly compared; but they have the appearance of having been made with them. The manner of making these puncheons is as follows: A true shilling is cut away to the outline of the head; that outline is fixed on a piece of steel, which is filed or cut close to the outline. This is a puncheon; and the puncheon makes the die, which is the counter-puncheon. A punchen is complete without letters, but it may be made with letters upon it; though from the difficulty and inconvenience it is never so made at the Mint; but after the die is struck, the letters are engraved on it. A puncheon alone without the counter-puncheon, will not make the figure; but to make an old shilling, or a base shilling current, nothing more is necessary than these instruments. They may be used for other purposes, such as making seals, buttons, medals, or other things where such impressions are wanted."

On the first day of Hilary Term, 1779, Eleven of the Judges (*absent* Ld. Ch. J. De Grey) were unanimously of opinion, That this was a puncheon within the meaning of the Act; and at the February Session following, the prisoner received judgment of high treason.



JONES'S CASE.

At Chelmsford, 21st July, 1779, *William Jones*, otherwise *Thoroughgood*, was indicted before Lord *Mansfield*, for that he having in his custody a certain forged paper-writing purporting to be a *Bank Note* (describing it) as followeth; *that is to say,*

“ N^o. F. 946.

“ I promise to pay *John Wilson*, Esq. or bearer, Ten Pounds.

“ £. TEN.

“ ENT^d. *John Jones*.

“ London, March 4, 1776.

“ For Self and Company of my
“ Bank in England.

did dispose of and put-away the said forged paper-writing as and for a good and true Bank Note, well knowing the same to be forged. There were other counts charging it to be—*First*, a certain forged and counterfeited note; and, *Secondly*, a forged paper-writing, purporting to be a promissory note for payment of money; and laying the offence to have been committed, *first*, with an intention to defraud the Bank of England; and, *secondly*, with an intention to defraud *James Rayner*.

The Jury acquitted the prisoner as to those counts which charged an intent to defraud the *Bank of England*; and as to the other counts, they found a special verdict to the following effect: That the paper-writing, purporting to be a Bank Note, is not a note filled up by any of the officers of the Governor and Company of the Bank of England, or entered in any of their books, but is forged: That the said *William Jones*, otherwise *Thoroughgood*, well knowing the said paper-writing not to be a note of the Governor and Company of the Bank of England, but to be forged, averred the same paper-writing to be a good Bank Note, and disposed of and put away the same as a good Bank Note to *James Rayner*, with intent to defraud the said *James Rayner*; and that the said *James Rayner* took the said paper-writing, and gave the full value of Ten Pounds for the same to the said *William Jones*, otherwise *Thoroughgood*, believing the said pa-

per-writing to be a true Bank Note. That the Governor and Company of the Bank of England frequently pay Bank Notes, which are filled up by their officers and entered in their books, although the same happen not to be signed: That the paper-writing purporting to be a promissory note for the payment of money, is not a note filled up by any of the officers of the Bank of England, &c. but is forged: That the said *William Jones*, otherwise *Thorowgood*, well knowing the said last-mentioned paper-writing not to be a note of the Governor and Company of the Bank of England, but to be forged, *averred* that it was a good Bank Note, and uttered and published it as a good Bank Note to *James Rayner*, as above-mentioned. But whether, &c.

On Wednesday, 24th November, 1779, this special verdict was argued in the Court of King's Bench by *M. Fielding* on the part of the prosecution, and by *Mr. Mingay* on the part of the prisoner.

The Court were of opinion, That the representation which the prisoner had made to *Rayner*, viz. That it was a good Bank Note, could not alter the *purport* of it, which is what appears upon the face of the instrument itself; for although such *false* representations might make the party guilty of a fraud or cheat, they could not make him guilty of felony.

THE
LAWYER'S
AND
MAGISTRATE'S MAGAZINE,
For MARCH, 1791.

ADJUDGED CASES
In the COURT OF KING'S BENCH, MICHAELMAS
TERM, 3^d GEO. III.

AURIOL v. MILLS, *in Error*.

THIS Case was removed by writ of error from the Court of Common Pleas. The case there, (which see Vol. I. ante p. 477), was an action of covenant against Auriol, a bankrupt, for non-payment of rent payable quarterly. The covenant on which the breach was assigned, after the usual words, *yielding and paying, &c.* was as follows: "And the said Peter James (the Defendant) for himself, his heirs, executors, administrators, and assigns, did thereby covenant, promise, and agree, (amongst other things) to and with the said Benjamin, (the Plaintiff), his heirs, and assigns, that he the said Peter James, his heirs, executors, administrators, or assigns, should and would, during all the rest of the said term, thereby demised, well and truly pay, or cause to be paid, unto the said Benjamin, his heirs and assigns, the said clear yearly rent of 110*l.* in manner and form aforesaid, according to the true intent and meaning of the said indenture."

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denture." The breach was the non-payment of 27*l.* 10*s.* for a quarter ending December 23. 1789.

The Defendant pleaded 1st. *Non est factum.* 2d. *Riens arre-
rere.* 3d. "That after the making of the said indenture in
the said declaration mentioned, and before the suing out of
the original writ of the said Benjamin against the said Peter
James, to wit, on the first day of January in the year of
our Lord 1789, and from thence until the day of suing out
the commission of bankruptcy hereinafter mentioned against
the said Peter James, he the said Peter James was a trader,
within the intent and meaning of the several statutes made,
and then in force, against bankrupts; that is to say, a mer-
chant, dealer, and chapman, to wit, at London aforesaid,
in the parish and ward aforesaid, and during all that time,
used and exercised the trade and business of a merchant, in
buying and selling divers silks, and other goods, wares, and
merchandizes, and receiving consignments of silks, and other
goods, and selling the same on commission for his corre-
spondents and customers, for profit and gain, and thereby
fought and endeavoured to get his living, as other persons
of the same trade usually do; and the said Peter James so
being such trader as aforesaid, within the intent and mean-
ing of the said several statutes made and then in force con-
cerning bankrupts, and so seeking his living by way of buy-
ing and selling as aforesaid, he the said Peter James after-
wards, and *before any of the rent or money in the said de-
claration mentioned, became due and payable,* to wit, on the 8th
day of June, in the year aforesaid, at London aforesaid, in
the parish and ward aforesaid, became and was indebted to
one George Tickner Hardy, gentleman, then being a sub-
ject of this realm, in 100*l.* of lawful money of Great Bri-
tain, for so much money, before that time, paid, laid out,
and expended, by the said George Tickner Hardy, to and
for the use of the said Peter James, at his special instance
and request; and the said Peter James being so indebted
as aforesaid, and being a subject of this realm, and so seek-
ing his living by way of buying and selling, as aforesaid, he
the said Peter James, afterwards, to wit, on the same day
and year last aforesaid, at London aforesaid, in the parish
and ward aforesaid, the said George Tickner Hardy to
being a creditor of the said Peter James, and being then
wholly unsatisfied his debt manifestly *became a bankrupt,*
within the intent and meaning of the several statutes made
and then in force against bankrupts; and the said Peter
James so being and remaining a bankrupt as aforesaid, he
the said George Tickner Hardy, as well for himself, as for

all other creditors of the said Peter James, afterwards, to wit, on the 9th day of June, in the year aforesaid, at Westminster in the county of Middlesex, to wit, at London aforesaid in the parish and ward aforesaid, exhibited his certain petition in writing to the Right Honourable Edward Lord Thurlow, then Lord High Chancellor of Great Britain, and thereby petitioned the said Lord Chancellor to grant to the said George Tickner Hardy his Majesty's commission, to be directed to such, and so many persons, as he should think fit to give his authority, of and concerning the said bankrupt, and to all other intents and purposes, according to the provisions of the statutes made, and then in force concerning bankrupts, as by the said petition remaining in the Court of Chancery of our Lord the now King, at Westminster aforesaid, more fully appears; and the said Peter James further saith, that upon the said petition of the said George Tickner Hardy, so exhibited as aforesaid, on behalf of himself and all other the then creditors of the said Peter James, according to the form of the statutes in such case made and provided, for giving them relief on that behalf, afterwards and *before the said sum of money in the said declaration mentioned, or any part thereof became due, and before the said supposed breach of covenant*, to wit, on the 9th day of June in the year aforesaid, at Westminster aforesaid, to wit, at London aforesaid, in the parish and ward aforesaid, a certain commission of our Lord the now King, founded upon the statutes made and then in force concerning bankrupts, in due form of law issued, under the Great Seal of Great Britain, bearing date the same day and year last aforesaid, directed to Michael Dodson, Thomas Plumer, Edward Finch Hatton, Robert Comyn, and Charles Proby, Esquires, and was then and there to them directed, by which said commission, our said Lord the now King gave full power and authority to them the said Michael Dodson, Thomas Plumer, Edward Finch Hatton, Robert Comyn, and Charles Proby, four or three of them, to proceed, according to the said statute, and all other statutes then in force concerning bankrupts, not only concerning the aforesaid bankrupt, his body, lands, tenements, with freehold and copyhold, goods, debts, and all other matters whatsoever, but also concerning all other persons, who by concealment, claim, or otherwise, should offend touching or concerning the premises, or any part thereof, against the true intent and purport of the said statutes, and to do, and execute, all and every thing and things whatsoever, as well for and towards satisfaction and payment of

the creditors of the said Peter James, as towards and for all other intents and purposes whatsoever, according to the order and provision of the said statutes, as by the said commission (amongst other things) more fully appears: by virtue of which said commission, and by force of the statutes aforesaid, the said Michael Dodson, Edward Finch Hatton, and Robert Comyn, three of the commissioners named in the said commission, afterwards, to wit, on the 5th day of June, in the year aforesaid, to wit, at London aforesaid, in the parish and ward aforesaid, having taken upon themselves the burthen of the said commission, then and there duly adjudged and declared the said Peter James, to have been, and become on the day of the issuing of the said commission, and then to be a bankrupt, within the true intent and meaning of the said statutes, some or one of them: and the said Peter James further says, that afterwards, to wit, on the 26th day of June in the year aforesaid, at London aforesaid, (the said Peter James then remaining and continuing a bankrupt as aforesaid) they the said Michael Dodson, Edward Finch Hatton, and Robert Comyn, in due manner, and according to the form of the statute in such case made and provided, by an indenture then and there duly made and bearing date the same day and year last aforesaid, between the said Michael Dodson, Edward Finch Hatton, and Robert Comyn, of the one part, and Robert Mendam, of Walbrook, London, Merchant, George Marsh, of Broad Street, London, silk-broker, and the said George Tickner Hardy of the other part, then and there duly bargained, disposed, assigned, and set over, amongst other things, the said indenture of lease in the said declaration mentioned, and all the estate and interest of the said Peter James, of, in, and to the same, and of, in, and to the premises thereby demised, to the said Robert Mendham, George Marsh, and George Tickner Hardy, (the said Robert Mendham, George Marsh, and George Tickner Hardy, before the said assignment so made to them as aforesaid, having been duly chosen assignees of the debts, credits, goods and chattels, estate, and effects of the said Peter James, the bankrupt, according to the form of the statutes in such case made and provided), to hold to them the said Robert Mendham, George Marsh, and George Tickner Hardy, their executors, administrators, and assigns, from thenceforth for the residue of the said demised term, then to come and unexpired; by virtue of which said assignment, all the estate, interest, and term of years then to come and unexpired, property, claim, and demand, of the said Peter

James, of and in the said indenture of lease, and of and the promises thereby demised, then and there became, and was vested in the said Robert Mendham, George Marsh, and George Tickner Hardy, as such assignees, and the same from thence hitherto hath been, and still is, vested in them, the said Robert Mendham, George Marsh, and George Tickner Hardy, (the said commission still remaining in full force and effect, in no ways superseded, cancelled, or set aside), and the said Robert Mendham, George Marsh, and George Tickner Hardy, then and there, to wit, on the same day and year last aforesaid, at London aforesaid, became, and were and for a long time, to wit, from hence hitherto have been possessed, of and in the said demised premises, with the appurtenances, and this the said Peter James is ready to verify, &c."

To this plea there was a general demurrer, and issue joined on the two first. And the Court of Common Pleas, after hearing the case twice argued, gave judgment for the Plaintiff.

The Case was now argued much at length by Mr. Park for the Plaintiff in Error, and this Court gave judgment as follows:

LORD KENYON, Ch. J.—It was not owing to any doubt that we entertained on this question that we did not pronounce judgment when the case was argued; but as a case was alluded to in *Hobart*, (*Wadham and Marlowe*, 82), which was not argued upon at the Bar, we wished to have an opportunity of examining that case before we gave our opinion. But on looking into it, we think that it does not press upon the present case; and we are all of opinion (in which Mr. J. Buller, who is now absent, concurs) that the judgment of the Court of Common Pleas must be affirmed. It is extremely clear that a person, who enters into an express covenant in a lease, continues liable on his covenant, notwithstanding the lease be assigned over. The distinction between the actions of debt and covenant, which was taken in early times, is equally clear: if the lessee assign over the lease, and the lessor accept the assignee as his lessee, either tacitly or expressly, it appears by the authorities that an action of debt will not lie against the original lessee; but all those cases with one voice declare that, if there be an *express covenant*, the obligation on such covenant still continues. And this is founded not on precedents only, but on reason; for when a landlord grant a lease, he selects his tenant; he trusts to the skill and responsibility of that tenant; and it cannot be endured that he should afterwards be deprived of his

his action on the covenant to which he trusted by an act to which he cannot object, as in the case of an execution. In such a case, the lessor has no choice of the under-tenant: so here the Assignees are bound to sell the term, and perhaps they may assign to a person in whom the lessor has no confidence.

Then it remains to be considered whether any exception to that general rule has taken place in the case of a bankruptcy. It seemed admitted in the argument, and indeed it cannot be disputed that, where a disposition of the lease has been made by virtue of a *fieri facias*, or an *elegit*, the lessee continues liable on his covenant, notwithstanding the estate be taken from him against his consent. On the same principle the South-sea Director was held liable, although he was divested of his property by the act of confiscation. So in the case of an attainder, and other cases, which it is not necessary to mention particularly, as they are all collected in the report of this case in the Common Pleas. Then what is there peculiar in the case of a bankrupt, which should differ it from those cases? No Act of Parliament has said that he shall be discharged from his covenants; neither is there any resolution in either of the Courts of Law to that effect: but, on the contrary, it has been uniformly determined in all the various cases on the subject that, for all contracts which are not to be performed till a period subsequent to the bankruptcy, the bankrupt shall still be liable, notwithstanding he is stripped of all his property; as in the case of *Goddard v. Vanderheyden*, and many others. So in this case the defendant's liability to pay happened after the bankruptcy; and therefore, on the principle of those cases, he remains liable, notwithstanding the commission of bankrupt divested him of all his property, for a certificate would only have made him a new man from the time when the act of bankruptcy was committed. But instances have occurred where persons, who have been declared bankrupts, have been possessed of considerable property after paying all their debts; as in that of *Sir S. Evans*. Then in reason, why should a person not continue liable on his covenant when his affairs are arranged? Then it was contended that the bankruptcy put an end to the privity of contract: but that argument is not well founded; for it was asked by Lord *Hardwicke* in the case of *Hornby v. Houlditch*, "What is there here to discharge the privity of contract or estate between the lessor and lessee? Or what is there to discharge an express covenant?" In the language of Lord *Hardwicke*, I may ask the same questions in this

the landlord done any act to discharge the lessee? Even in cases where the landlord has expressly consented to receive the assignee as his tenant, the original lessee has always been held liable on his covenant; and those are, in my opinion, much stronger cases than the present, where the assignees are forced upon the landlord without his consent. This is like the case of an execution; and indeed in some of the books it is called a *statutè execution*. In every view of the question, therefore, I am clearly of opinion that this case was properly decided in the Court of Common Pleas, and that that judgment ought to be affirmed.

Judgment affirmed.

TUBBS v. HARRISON and Son.

On the trial of this action it appeared that the Defendants were father and son, and differences arising between the son and his wife, they separated, and the Defendants covenanted to pay the wife an annuity of 50*l.* a year, and to pay all the debts contracted by her, which her husband was by law liable to pay. That the wife at this time had contracted a debt to the Plaintiff, for money paid and laid out for necessaries for one John Perrin, her infant son by a former husband, at her request.

A verdict was taken for the Plaintiff, which now came before the Court, subject to the question, Whether the husband is bound to pay this debt for the maintenance of his wife's child by a former husband?

LORD KENYON, Ch. J.—By the record of the Case of *Rex v. Munnay*, *Stra.* 190, it clearly appears that the wife was alive when the order was made. The Court in that case reversed the order of maintenance, on the ground that the statute of *Elizabeth* only extends to natural relations. Therefore, on the authority of that case, we are of opinion that the husband is not liable for the expences of maintaining the wife's child by the former husband; and consequently that those articles in the account must be disallowed.

DE. MORANDO v. DUNKIN,

The Plaintiffs having taken out a *capias* against the Defendants, sent it to their agent in Cornwall, who applied to the Sheriff for a warrant on it, directed to his own Clerk, by reason that the Under-Sheriff was concerned as Attorney for one of the Defendants. The Sheriff accordingly granted a warrant to the Clerk, and the Defendant was arrested and escaped; and now upon a motion to set aside the rule for the Sheriff to return the writ, it was contended that the Plaintiffs had no right to a return of the writ, as the Sheriff had granted the warrant to a special bailiff at the particular request of the Plaintiff.

LORD KENYON, Ch. J.—The rule, which has been obtained, to require the Sheriff to return the writ, cannot be supported. The Plaintiffs say, that, because the bailiff, nominated by them, and at their special request, has misconducted himself, the Sheriff shall be answerable for his misconduct: but it seems to me that it was a groundless application. The cases cited are not applicable to the present: the question in *Yates v. Freckleton* was, Whether or not the agent were authorized to receive the debt? and the Court very properly determined that he exceeded the power given to him. But here the agent was empowered to put the writ in force, which certainly includes the form and the mode of executing it.

BULLER, J.—The plaintiffs have acted wrong throughout. In the first place the application to the Sheriff was out of the ordinary course of business; he is ignorant of the forms of the office, and though he be responsible for the acts of his Under-Sheriff, yet this kind of business is entirely conducted by the Under-Sheriff. The application too was for a favour; it was to indulge the plaintiffs with the nomination of their own bailiff; who perhaps suffered the party to escape in order to charge the Sheriff. And now the plaintiffs contend that, by this contrivance, they are entitled to maintain an action against the Sheriff for the purpose of driving him to bring another action against their own agent. But this question does not arise now for the first time; it

has

has been repeatedly held that if a special bailiff be appointed on the nomination of the Plaintiff, the latter must take the consequence of the acts of the former: the Court has considered them as the acts of the Plaintiff himself, and has refused to call on the Sheriff to return the writ in such cases.

Rule absolute.

NUTT v. VERNER.

The Defendant *being insane* was arrested. Motion to discharge him upon Common Bail.

The Court said.—In the case of *Bernot v. Norman* (T. R. 11 279), the defendant became insane *after* the arrest; but we cannot interfere in this case any more than in the other.

Rule refused.

BENNET v. NICHOLS.

The question was, How many days were allowed to a Defendant to put in bail in error?

By the Court. He has four clear days; and in this Case the Judgment being signed on Monday, the Plaintiff is not entitled to sue out execution till Saturday.

HOUSE

HOUSE OF LORDS,

FEBRUARY 3, 1791.

MINET and FECTOR, *against* GIBSON and JOHNSON,
in Error.

This action was tried before Lord Kenyon, at Guildhall, in the Michaelmas Sittings, 1789. There perhaps never was tried a cause, in the event of which a larger property was involved. Upwards of a million of money was supposed to lie in bills drawn in a manner similar to the present.

Livesey and Co. drew a Bill of Exchange on Gibson and Johnson, for £.721 5s. dated February 18, 1788, and payable at three months, to John White, or Order, who was a fictitious payee.

This bill was accepted by the Defendants, and discounted by the Plaintiffs: who, of course, in the character of indorsers, for a full and valuable consideration, brought this action against the acceptors.

THE DECLARATION.

London. To wit, Thomas Gibson, late of London, Merchant, and Joseph Johnson, late of the same place, Merchant, were attached to answer Hugh Minet and James Peter Fector, in a plea of trespass on the case. And whereupon the said Hughes and James Peter, by Edwin Dawes, their Attorney, complain.

First count.—For that whereas certain persons using trade and commerce as co-partners, in the co-partnership name and firm of Livesey Hargreave, and Company, on the 18th day of February, in the year of our Lord 1788, at Manchester, to wit, at London aforesaid, at the parish of St. Mary-le-Bow, in the Ward of Cheap, according to the usage and custom of merchants, made their certain Bill of Exchange in writing, the hand of one of the said co-partners, on their joint account, and in their co-partnership name and firm, to wit, Livesey, Hargreave, and Co. being thereunto subscribed, bearing date the same day and year aforesaid, and directed the same Bill of Exchange to the said

Thomas Gibson and Joseph Johnson, by the names and description of Messrs. Gibson and Johnson, Bankers, London, and thereby required the said Thomas Gibson and Joseph Johnson, three months after date, to pay to Mr. John White, or order, £. 721 5s. value received, with or without advice; they the said Livesey, Hargreave, and Company, then and there well knowing that no such person as John White, in the said Bill of Exchange mentioned, existed. Upon which said Bill of Exchange, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, a certain indorsement in writing was made, purporting to be the indorsement of John White, named in the said bill, and to be subscribed with his hand and name, and which said indorsement purported to require the said sum of money, in the said Bill of Exchange contained, to be paid to the said Livesey, Hargreave and Company, or their Order. And the said Bill of Exchange, being so indorsed as aforesaid, they the said persons using trade and commerce in the name and firm of Livesey, Hargreave and Company, as aforesaid, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, by a certain indorsement in writing, made upon the said Bill of Exchange, and subscribed with the hand and name of one Absalom Goodrich, by procuration of the said Livesey, Hargreave and Co. according to the usage and custom of merchants, appointed the said sum of money, in the said Bill of Exchange contained, to be paid to the said Hughes and James Peter, and then and there delivered the said Bill of Exchange, so indorsed as aforesaid, as well with the name of the said John White, as with the name of the said Absalom, to the said Hughes and James Peter; which said Bill of Exchange, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, according to the usage and custom of merchants, was shewd and presented to the said Thomas Gibson and Joseph Johnson, for their acceptance thereof; and the said Thomas Gibson and Joseph Johnson then and there according to the usage and custom of merchants, accepted the same, they the said Thomas Gibson and Joseph Johnson then and there well knowing that no such person as John White, in the said Bill of Exchange named, existed; and that the name of John White, so indorsed on the said Bill of Exchange, was not the hand-writing of any person of that name; by reason whereof, and by force of the usage and custom of merchants, the said Thomas Gibson and Joseph

476 CASE OF MINNET & GIBSON,

Joseph Johnson became liable to pay to the said Hughes and James Peter the said sum of money in the said Bill of Exchange contained, according to the tenor and effect of the said Bill of Exchange, and their acceptance thereof, as aforesaid. And being so liable, they the said Thomas Gibson and Joseph Johnson, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, undertook, and to the said Hughes and James Peter then and there faithfully promised to pay them the said sum of money in the said Bill of Exchange contained, according to the tenor and effect of the said Bill of Exchange, and their acceptance thereof, as aforesaid.

Second count.—And whereas also, the said persons using trade and commerce as co-partners, in the co-partnership name and firm of Livesey, Hargreave and Company, on the said 18th day of February, in the said year of our Lord 1788, at Manchester, to wit, at London aforesaid, in the parish and ward aforesaid, according to the usage and custom of merchants, made their certain other Bill of Exchange in writing, the hand of one of the said co-partners, on their joint account, and in their said co-partnership name and firm, to wit, Livesey, Hargreave and Company, being thereunto subscribed, bearing date the same day and year aforesaid, and then and there directed the said last-mentioned Bill of Exchange to the said Thomas Gibson and Joseph Johnson, by the names and description of Messrs. Gibson and Johnson, Bankers, London; and thereby required the said Thomas Gibson and Joseph Johnson, three months after date, to pay to Mr. John White, or Order, £.721 5s. value received, with or without advice; they the said Livesey, Hargreave and Company, then and there well knowing that the said last named John White was not a person dealing with, or known to the said Livesey, Hargreave and Company, and using the name of the said John White in the same bill, as a nominal person only, and intending not to deliver the same to him, or to procure the same to be actually endorsed by him; upon which said last-mentioned Bill of Exchange, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, a certain indorsement in writing was made, purporting to be the indorsement of John White, named in the same bill, and to be subscribed with his hand and name; and which said last-mentioned indorsement purported to require the said sum of money, in the same Bill of Exchange contained, to be paid to the said Livesey, Hargreave and Company, at their order: and the said last-mentioned Bill of

change, being so indorsed as aforesaid, they the said persons using trade and commerce in the name and firm of Livezey, Hargreave and Company, as aforesaid, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, by a certain indorsement made upon the said last-mentioned Bill of Exchange, and subscribed with the hand and name of one Absalom Goodrich, by procuration of the said Livezey, Hargreave and Company, according to the usage and custom of merchants, appointed the said sum of money, in the said last-mentioned Bill of Exchange contained, to be paid to the said Hughes and James Peter, and then and there delivered the said last-mentioned Bill of Exchange, so indorsed as aforesaid, to the said Hughes and James Peters, without having delivered the same bill to the said John White, and without any actual indorsement or assignment of the same bill by the said John White; which said last-mentioned Bill of Exchange, so indorsed as aforesaid, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, according to the usage and custom of merchants, was shewn and presented to the said Thomas Gibson and Joseph Johnson for their acceptance thereof; and the said Thomas Gibson and Joseph Johnson, then and there well knowing that the said Livezey, Hargreave and Company, had made and delivered the same bill in manner aforesaid, and with such intention as aforesaid, and that the name of John White, indorsed upon the said last mentioned Bill of Exchange, was not the proper hand-writing of John White, in the same bill mentioned, then and there accepted the same: by reason whereof, and by force of the usage and custom of merchants, the said Thomas Gibson and Joseph Johnson became liable to pay to the said Hughes and James Peter the said sum of money in the said last-mentioned Bill of Exchange contained, according to the tenor and effect of the said last-mentioned Bill of Exchange, and their acceptance thereof, as aforesaid. And being so liable, they the said Thomas Gibson and Joseph Johnson, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, undertook, and to the said Hughes and James Peter then and there faithfully promised to pay to them the said sum of money in the said last-mentioned Bill of Exchange contained, according to the tenor and effect of the same bill, and their acceptance thereof, as last aforesaid.

Third count.—And whereas also, the said persons using trade and commerce as co-partners, in the co-partnership

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name and firm of Livesey, Hargreave and Company on the said 18th day of February, in the said year of our Lord 1788, at Manchester, to wit, at London aforesaid, at the parish and ward aforesaid, according to the usage and custom of merchants, made their certain other Bill of Exchange in writing, the hand of the said co-partners, on their joint account, and in their said co-partnership name and firm, to wit, Livesey, Hargreave and Company, being thereunto subscribed, bearing date the same day and year aforesaid, and then and there directed the said last-mentioned Bill of Exchange to the said Thomas Gibson and Joseph Johnson, by the names and description of Messrs. Gibson and Johnson, Bankers, London; and thereby required the said Thomas Gibson and Joseph Johnson, three months after date, to pay to them, the said Livesey, Hargreave and Company, by the name and description of Mr. John White, or Order, £.721 5s. value received, with or without advice. And the same persons so using trade and commerce, in the name and firm of Livesey, Hargreave and Company, as aforesaid, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, by a certain indorsement in writing made upon the said last-mentioned Bill of Exchange, subscribed with the hand and name of one Absalom Goodrich, by procuration of the said Livesey, Hargreave and Company, according to the usage and custom of merchants, appointed the said sum of money, in the said last-mentioned Bill of Exchange contained, to be paid to the said Hughes and James Peter, and then and there delivered the said last-mentioned Bill of Exchange, so indorsed as aforesaid, and also having the name of John White indorsed upon the same, to the said Hughes and James Peter; which said last-mentioned Bill of Exchange, afterwards to wit, on the same day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, according to the usage and custom of merchants, was shewn and presented to the said Thomas Gibson and Joseph Johnson, for their acceptance thereof; and the said Thomas Gibson and Joseph Johnson, then and there, according to the usage and custom of merchants, accepted the same: by reason whereof, and by force of the usage and custom of merchants, the said Thomas Gibson and Joseph Johnson became liable to pay to the said Hughes and James Peter the said sum of money in the said last-mentioned Bill of Exchange contained, according to the tenor and effect of the said last-mentioned

Bill of Exchange, and their acceptance thereof, as aforesaid. And being so liable, they the said Thomas Gibson and Joseph Johnson, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, undertook, and to the said Hughes and James Peter then and there faithfully promised to pay to them the said sum of money in the said last-mentioned Bill of Exchange contained, according to the tenor and effect of the same bill, and their acceptance thereof, as last aforesaid.

Fourth count.—And whereas also, the said persons using trade and commerce as co-partners, in the co-partnership name and firm of Livesey, Hargreave and Company, on the said 18th day of February, in the said year of our Lord 1788, at Manchester, to wit, at London aforesaid, at the parish and ward aforesaid, according to the usage and custom of merchants, made their certain other Bill of Exchange in writing, the hand of one of the said co-partners, on their joint account, and in their said co-partnership name and firm, to wit, Livesey, Hargreave and Company, being thereunto subscribed, bearing date the same day and year aforesaid; and then and there directed the said last-mentioned Bill of Exchange to the said Thomas Gibson and Joseph Johnson, by the names and description of Messrs. Gibson and Johnson Bankers, London; and thereby requested them, the said Thomas Gibson and Joseph Johnson, three months after date, to pay to Mr. John White, or Order, £. 721 5s. value received, with or without advice; and then and there delivered the said Bill of Exchange to the said John White; and the said John White afterwards, to wit, on the same day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, according to the usage and custom of merchants, indorsed the said Bill of Exchange; and, by that indorsement, appointed the said sum of money, in the said last-mentioned Bill of Exchange contained, to be paid to the said Hughes and James Peter, and then and there delivered the said last-mentioned Bill of Exchange, so indorsed, to the said Hughes and James Peter; which said Bill of Exchange afterwards, to wit, on the same day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, according to the usage and custom of merchants, was shewn and presented to the said Thomas Gibson and Joseph Johnson, for their acceptance thereof; and the said Thomas Gibson and Joseph Johnson, then and there, according to the usage and custom of merchants, accepted the same; by reason whereof, and by force of the usage and custom

custom of merchants, the said Thomas Gibson and Joseph Johnson became liable to pay to the said Hughes and James Peter, the said sum of money in the said last-mentioned Bill of Exchange contained, according to the tenor and effect of the said last-mentioned Bill of Exchange, and their acceptance thereof, as last aforesaid. And being so liable, they, the said Thomas Gibson and Joseph Johnson, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, undertook, and to the said Hughes and James Peter then and there faithfully promised to pay them the said sum of money in the said last-mentioned Bill of Exchange contained, according to the tenor and effect of the said last-mentioned Bill of Exchange, and their acceptance thereof, as aforesaid.

Fifth Count.—And whereas also the said persons using trade and commerce as co-partners, in the co-partnership name and firm of Livesey, Hargreave and Company, on the said 18th day of February, in the said year of our Lord 1788, at Manchester, to wit, at London aforesaid, at the parish and ward aforesaid, according to the usage and custom of merchants, made their certain other Bill of Exchange, in writing, the hand of one of the said co-partners, on their joint account, and in their said co-partnership name and firm, to wit, Livesey, Hargreave and Company being thereunto subscribed, bearing date the same day and year aforesaid, and then and there directed the said last-mentioned Bill of Exchange to the said Thomas Gibson and Joseph Johnson, by the names and description of Messrs. Gibson and Johnson, Bankers, London; and thereby required them, the said Thomas Gibson and Joseph Johnson, three months after date, to pay to the Bearer of the said last-mentioned bill, £.721 5s. value received with or without advice: and the said Hughes and James Peter in fact say, that afterwards, and before any payment of the said last-mentioned Bill of Exchange, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, they the said Hughes and James Peter became, and were the bearers and owners of the said last-mentioned bill of Exchange, of which last-mentioned premises the said Thomas and Joseph then and there had notice. And the said Hughes and James Peter further say, that afterwards, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, the said last-mentioned bill of Exchange was presented and shewn to the said Thomas and Joseph, who thereupon, then and there

duly accepted the same, according to the usage and custom of merchants, aforesaid: by reason whereof, and according to the usage and custom of merchants, the said Thomas and Joseph became liable to pay to the said Hughes and James Peter, the said sum of money in the said last-mentioned Bill of Exchange specified, according to the tenor and effect of the same bill. And being so liable, they, the said Thomas and Joseph, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, undertook, and to the said Hughes and James Peter then and there faithfully promised to pay them the said sum of money in the said last-mentioned Bill of Exchange specified, according to the tenor and effect of the same last-mentioned Bill of Exchange.

Sixth count.—And whereas also, the said persons using trade and commerce as co-partners, in the co-partnership name and firm of Livezey, Hargreave and Company, on the said 18th day of February, in the said year of our Lord 1788, at Manchester, to wit, at London aforesaid, at the parish and ward aforesaid, according to the said usage and custom of merchants, made their certain other Bill of Exchange in writing, the hand of one of them on their joint account, and in their said co-partnership name and firm, of Livezey, Hargreave and Company, being thereunto subscribed, bearing date the same day and year aforesaid; and then and there directed the said last-mentioned Bill of Exchange to the said Thomas Gibson and Joseph Johnson, by the names and description of Messrs. Gibson and Johnson Bankers, London; and thereby requested the said Thomas Gibson and Joseph Johnson, three months after date, to pay to Mr. John White, or Order, £.721 5s. value received, with or without advice: and the said Hughes and James Peter aver that when the said last-mentioned Bill of Exchange was so made as aforesaid, or at any time afterwards, there was not any such person as John White; the supposed payee, named in the same Bill of Exchange: but that the same name was merely fictitious, to wit, at London aforesaid, at the parish and ward aforesaid: by reason whereof, the said sum of money mentioned in the said last-mentioned Bill of Exchange, became, and was payable to the bearer thereof, according to the effect and meaning of the said bill. And the said Hughes and James Peter aver, that they the said Hughes and James Peter afterwards, to wit, on the same day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, in due form of law

DE MORANDO V. DUNKIN.

The Plaintiffs having taken out a *capias* against the Defendants, sent it to their agent in Cornwall, who applied to the Sheriff for a warrant on it, directed to his own Clerk, by reason that the Under-Sheriff was concerned as Attorney for one of the Defendants. The Sheriff accordingly granted a warrant to the Clerk, and the Defendant was arrested and escaped; and now upon a motion to set aside the rule for the Sheriff to return the writ, it was contended that the Plaintiffs had no right to a return of the writ, as the Sheriff had granted the warrant to a special bailiff at the particular request of the Plaintiff.

LORD KENYON, Ch. J.—The rule, which has been obtained, to require the Sheriff to return the writ, cannot be supported. The Plaintiffs say, that, because the bailiff, nominated by them, and at their special request, has misconducted himself, the Sheriff shall be answerable for his misconduct: but it seems to me that it was a groundless application. The cases cited are not applicable to the present: the question in *Yates v. Freckleton* was, Whether or not the agent were authorized to receive the debt? and the Court very properly determined that he exceeded the power given to him. But here the agent was empowered to put the writ in force, which certainly includes the form and the mode of executing it.

BULLER, J.—The plaintiffs have acted wrong throughout. In the first place the application to the Sheriff was out of the ordinary course of business; he is ignorant of the forms of the office, and though he be responsible for the acts of his Under-Sheriff, yet this kind of business is entirely conducted by the Under-Sheriff. The application too was for a favour; it was to indulge the plaintiffs with the nomination of their own bailiff; who perhaps suffered the party to escape in order to charge the Sheriff. And now the plaintiffs contend that, by this contrivance, they are entitled to maintain an action against the Sheriff for the purpose of driving him to bring another action against their own agent. But this question does not arise now for the first time; it has

has been repeatedly held that if a special bailiff be appointed on the nomination of the Plaintiff, the latter must take the consequence of the acts of the former: the Court has considered them as the acts of the Plaintiff himself, and has refused to call on the Sheriff to return the writ in such cases.

Rule absolute.

NUTT v. VERNEY.

The Defendant *being insane* was arrested. Motion to discharge him upon Common Bail.

The Court said:—In the case of *Ernst v. Norman* (T. R. 11 279), the defendant became insane *after* the arrest; but we cannot interfere in this case any more than in the other.

Rule refused.

BENNET v. NICHOLS.

The question was, How many days were allowed to a Defendant to put in bail in error?

By the Court. He has four clear days; and in this Case the Judgment being signed on Monday, the Plaintiff is not entitled to sue out execution till Saturday.

HOUSE OF LORDS,

FEBRUARY 3, 1791.

MINET and FECTOR, *against* GIBSON and JOHNSON,
in Error.

This action was tried before Lord Kenyon, at Guildhall, in the Michaelmas Sittings, 1789. There perhaps never was tried a cause, in the event of which a larger property was involved. Upwards of a million of money was supposed to lie in bills drawn in a manner similar to the present.

Livezey and Co. drew a Bill of Exchange on Gibson and Johnson, for £.721 5s. dated February 18, 1788, and payable at three months, to John White, or Order, who was a fictitious payee.

This bill was accepted by the Defendants, and discounted by the Plaintiffs: who, of course, in the character of indorsers, for a full and valuable consideration, brought this action against the acceptors.

THE DECLARATION.

London. To wit, Thomas Gibson, late of London, Merchant, and Joseph Johnson, late of the same place, Merchant, were attached to answer Hugh Minet and James Peter Fector, in a plea of trespass on the case. And whereupon the said Hughes and James Peter, by Edwin Dawes, their Attorney, complain.

First count.—For that whereas certain persons using trade and commerce as co-partners, in the co-partnership name and firm of Livezey Hargreave, and Company, on the 18th day of February, in the year of our Lord 1788, at Manchester, to wit, at London aforesaid, at the parish of St. Mary-le-Bow, in the Ward of Cheap, according to the usage and custom of merchants, made their certain Bill of Exchange in writing, the hand of one of the said co-partners, on their joint account, and in their co-partnership name and firm, to wit, Livezey, Hargreave, and Co. being thereunto subscribed, bearing date the same day and year aforesaid, and directed the same Bill of Exchange to the said
Thomas

Thomas Gibson and Joseph Johnson, by the names and description of Messrs. Gibson and Johnson, Bankers, London, and thereby required the said Thomas Gibson and Joseph Johnson, three months after date, to pay to Mr. John White, or order, £. 721 5s. value received, with or without advice; they the said Livesey, Hargreave, and Company, then and there well knowing that no such person as John White, in the said Bill of Exchange mentioned, existed. Upon which said Bill of Exchange, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, a certain indorsement in writing was made, purporting to be the indorsement of John White, named in the said bill, and to be subscribed with his hand and name, and which said indorsement purported to require the said sum of money, in the said Bill of Exchange contained, to be paid to the said Livesey, Hargreave and Company, or their Order. And the said Bill of Exchange, being so indorsed as aforesaid, they the said persons using trade and commerce in the name and firm of Livesey, Hargreave and Company, as aforesaid, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, by a certain indorsement in writing, made upon the said Bill of Exchange, and subscribed with the hand and name of one Abfalom Goodrich, by procuration of the said Livesey, Hargreave and Co. according to the usage and custom of merchants, appointed the said sum of money, in the said Bill of Exchange contained, to be paid to the said Hughes and James Peter, and then and there delivered the said Bill of Exchange, so indorsed as aforesaid, as well with the name of the said John White, as with the name of the said Abfalom, to the said Hughes and James Peter; which said Bill of Exchange, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, according to the usage and custom of merchants, was shewd and presented to the said Thomas Gibson and Joseph Johnson, for their acceptance thereof; and the said Thomas Gibson and Joseph Johnson then and there according to the usage and custom of merchants, accepted the same, they the said Thomas Gibson and Joseph Johnson then and there well knowing that no such person as John White, in the said Bill of Exchange named, existed; and that the name of John White, so indorsed on the said Bill of Exchange, was not the hand-writing of any person of that name; by reason whereof, and by force of the usage and custom of merchants, the said Thomas Gibson and Joseph

Joseph Johnson became liable to pay to the said Hughes and James Peter the said sum of money in the said Bill of Exchange contained, according to the tenor and effect of the said Bill of Exchange, and their acceptance thereof, as aforesaid. And being so liable, they the said Thomas Gibson and Joseph Johnson, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, undertook, and to the said Hughes and James Peter then and there faithfully promised to pay them the said sum of money in the said Bill of Exchange contained, according to the tenor and effect of the said Bill of Exchange, and their acceptance thereof, as aforesaid.

Second count.—And whereas also, the said persons using trade and commerce as co-partners, in the co-partnership name and firm of Livesey, Hargreave and Company, on the said 18th day of February, in the said year of our Lord 1788, at Manchester, to wit, at London aforesaid, in the parish and ward aforesaid, according to the usage and custom of merchants, made their certain other Bill of Exchange in writing, the hand of one of the said co-partners, on their joint account, and in their said co-partnership name and firm, to wit, Livesey, Hargreave and Company, being thereunto subscribed, bearing date the same day and year aforesaid, and then and there directed the said last-mentioned Bill of Exchange to the said Thomas Gibson and Joseph Johnson, by the names and description of Messrs. Gibson and Johnson, Bankers, London; and thereby required the said Thomas Gibson and Joseph Johnson, three months after date, to pay to Mr. John White, or Order, £.721 5s. value received, with or without advice; they the said Livesey, Hargreave and Company, then and there well knowing that the said last named John White was not a person dealing with, or known to the said Livesey, Hargreave and Company, and using the name of the said John White in the same bill, as a nominal person only, and intending not to deliver the same to him, or to procure the same to be actually endorsed by him; upon which said last-mentioned Bill of Exchange, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, a certain indorsement in writing was made, purporting to be the indorsement of John White, named in the same bill, and to be subscribed with his hand and name; and which said last-mentioned indorsement purported to require the said sum of money, in the same Bill of Exchange contained, to be paid to the said Livesey, Hargreave and Company, or their order: and the said last-mentioned Bill of Exchange,

change, being so indorsed as aforesaid, they the said persons using trade and commerce in the name and firm of Livesey, Hargreave and Company, as aforesaid, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, by a certain indorsement made upon the said last-mentioned Bill of Exchange, and subscribed with the hand and name of one Abialom Goodrich, by procuration of the said Livesey, Hargreave and Company, according to the usage and custom of merchants, appointed the said sum of money, in the said last-mentioned Bill of Exchange contained, to be paid to the said Hughes and James Peter, and then and there delivered the said last-mentioned Bill of Exchange, so indorsed as aforesaid, to the said Hughes and James Peters, without having delivered the same bill to the said John White, and without any actual indorsement or assignment of the same bill by the said John White; which said last-mentioned Bill of Exchange, so indorsed as aforesaid, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, according to the usage and custom of merchants, was shewn and presented to the said Thomas Gibson and Joseph Johnson for their acceptance thereof; and the said Thomas Gibson and Joseph Johnson, then and there well knowing that the said Livesey, Hargreave and Company, had made and delivered the same bill in manner aforesaid, and with such intention as aforesaid, and that the name of John White, indorsed upon the said last-mentioned Bill of Exchange, was not the proper hand-writing of John White, in the same bill mentioned, then and there accepted the same: by reason whereof, and by force of the usage and custom of merchants, the said Thomas Gibson and Joseph Johnson became liable to pay to the said Hughes and James Peter the said sum of money in the said last-mentioned Bill of Exchange contained, according to the tenor and effect of the said last-mentioned Bill of Exchange, and their acceptance thereof, as aforesaid. And being so liable, they the said Thomas Gibson and Joseph Johnson, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, undertook, and to the said Hughes and James Peter then and there faithfully promised to pay to them the said sum of money in the said last-mentioned Bill of Exchange contained, according to the tenor and effect of the same bill, and their acceptance thereof, as last aforesaid.

Third count.—And whereas also, the said persons using trade and commerce as co-partners, in the co-partnership
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name and firm of Livesey, Hargreave and Company on the said 18th day of February, in the said year of our Lord 1788, at Manchester, to wit, at London aforesaid, at the parish and ward aforesaid, according to the usage and custom of merchants, made their certain other Bill of Exchange in writing, the hand of the said co-partners, on their joint account, and in their said co-partnership name and firm, to wit, Livesey, Hargreave and Company, being thereunto subscribed, bearing date the same day and year aforesaid, and then and there directed the said last-mentioned Bill of Exchange to the said Thomas Gibson and Joseph Johnson, by the names and description of Messrs. Gibson and Johnson, Bankers, London; and thereby required the said Thomas Gibson and Joseph Johnson, three months after date, to pay to them, the said Livesey, Hargreave and Company, by the name and description of Mr. John White, or Order, £.721 5s. value received, with or without advice. And the same persons so using trade and commerce, in the name and firm of Livesey, Hargreave and Company, as aforesaid, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, by a certain indorsement in writing made upon the said last-mentioned Bill of Exchange, subscribed with the hand and name of one Absalom Goodrich, by procuration of the said Livesey, Hargreave and Company, according to the usage and custom of merchants, appointed the said sum of money, in the said last-mentioned Bill of Exchange contained, to be paid to the said Hughes and James Peter, and then and there delivered the said last-mentioned Bill of Exchange, so indorsed as aforesaid, and also having the name of John White indorsed upon the same, to the said Hughes and James Peter; which said last-mentioned Bill of Exchange, afterwards to wit, on the same day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, according to the usage and custom of merchants, was shewn and presented to the said Thomas Gibson and Joseph Johnson, for their acceptance thereof; and the said Thomas Gibson and Joseph Johnson, then and there, according to the usage and custom of merchants, accepted the same: by reason whereof, and by force of the usage and custom of merchants, the said Thomas Gibson and Joseph Johnson became liable to pay to the said Hughes and James Peter the said sum of money in the said last-mentioned Bill of Exchange contained, according to the tenor and effect of the said last-mentioned Bill

Bill of Exchange, and their acceptance thereof, as aforesaid. And being so liable, they the said Thomas Gibson and Joseph Johnson, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, undertook, and to the said Hughes and James Peter then and there faithfully promised to pay to them the said sum of money in the said last-mentioned Bill of Exchange contained, according to the tenor and effect of the same bill, and their acceptance thereof, as last aforesaid.

Fourth count.—And whereas also, the said persons using trade and commerce as co-partners, in the co-partnership name and firm of Livezey, Hargreave and Company, on the said 18th day of February, in the said year of our Lord 1788, at Manchester, to wit, at London aforesaid, at the parish and ward aforesaid, according to the usage and custom of merchants, made their certain other Bill of Exchange in writing, the hand of one of the said co-partners, on their joint account, and in their said co-partnership name and firm, to wit, Livezey, Hargreave and Company, being thereunto subscribed, bearing date the same day and year aforesaid; and then and there directed the said last-mentioned Bill of Exchange to the said Thomas Gibson and Joseph Johnson, by the names and description of Messrs. Gibson and Johnson Bankers, London; and thereby requested them, the said Thomas Gibson and Joseph Johnson, three months after date, to pay to Mr. John White, or Order, £.721 5s. value received, with or without advice; and then and there delivered the said Bill of Exchange to the said John White; and the said John White afterwards, to wit, on the same day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, according to the usage and custom of merchants, indorsed the said Bill of Exchange; and, by that indorsement, appointed the said sum of money, in the said last-mentioned Bill of Exchange contained, to be paid to the said Hughes and James Peter, and then and there delivered the said last-mentioned Bill of Exchange, so indorsed, to the said Hughes and James Peter; which said Bill of Exchange afterwards, to wit, on the same day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, according to the usage and custom of merchants, was shewn and presented to the said Thomas Gibson and Joseph Johnson, for their acceptance thereof; and the said Thomas Gibson and Joseph Johnson, then and there, according to the usage and custom of merchants, accepted the same; by reason whereof, and by force of the usage and custom

became, and were, and still continue, the bearers and proprietors of the said last-mentioned Bill of Exchange. And the said Hughes and James Peter further say, that afterwards, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, the said last-mentioned Bill of Exchange was presented and shewn to the said Thomas Gibson and Joseph Johnson, who then and there duly accepted the same, according to the usage and custom of merchants: by reason whereof, and according to the said usage and custom of merchants they the said Thomas Gibson and Joseph Johnson, then and there, became liable to pay to the said Hughes and James Peter, the said sum of money in the said last-mentioned Bill of Exchange specified according to the tenor and effect thereof. And being so liable, they the said Thomas Gibson and Joseph Johnson, in consideration thereof afterwards, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, undertook, and to the said Hughes and James Peter then and there faithfully promised to pay them the said sum of money in the said last-mentioned Bill of Exchange specified, according to the tenor and effect of the same bill.

Seventh Count.—And whereas also, before and at the time of the making and indorsing of the Bill of Exchange herein-after-mentioned, there was a certain partnership or house of certain persons using trade and commerce, as well in the names and firm of Livesey, Hargreave and Company, as in the name and firm of John White, to wit, at London aforesaid, at the parish and ward aforesaid; and whereas the said last-mentioned persons on the said 18th day of February, in the year of our Lord 1788, aforesaid, at Manchester, to wit, at London, aforesaid, at the parish and ward aforesaid, according to the usage and custom of merchants, made their certain other Bill of Exchange, in writing, the hand of one of the said last-mentioned co-partners, on their joint account, and in their co-partnership name and firm of Livesey, Hargreave and Company being thereunto subscribed, bearing date the same day and year aforesaid; and then and there directed the said last-mentioned Bill of Exchange to the said Thomas Gibson and Joseph Johnson, by the names and description of Messrs. Gibson and Johnson, Bankers, London; and thereby required the said Thomas Gibson and Joseph Johnson, three months after date, to pay them, the said last-mentioned co-partners, by the name of Mr. John White, or Order, £.721 5s. value received with or without advice: and the said last-mentioned co-partners

afterwards, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, by a certain indorsement in writing by them made upon the said last-mentioned Bill of Exchange, according to the usage and custom of merchants, appointed the said sum of money, in the said last-mentioned Bill of Exchange contained, to be paid to the said Hughes and James Peter and then and there delivered the said last-mentioned Bill of Exchange, so indorsed as aforesaid, to the said Hughes and James Peter: which said last-mentioned Bill of Exchange afterwards, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, according to the usage and custom of merchants, was shewn and presented to the said Thomas Gibson and Joseph Johnson, for their acceptance thereof; and the said Thomas Gibson and Joseph Johnson, then and there according to the usage and custom of merchants, accepted the same; by reason whereof, and by force of the usage and custom of merchants, the said Thomas Gibson and Joseph Johnson became liable, to pay to the said Hughes and James Peter the said sum of money in the said last-mentioned Bill of Exchange contained, according to the tenor and effect of the said Bill of Exchange, and their acceptance thereof, as aforesaid. And being so liable, they the said Thomas Gibson and Joseph Johnson afterwards, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, undertook, and to the said Hughes and James Peter then and there faithfully promised to pay to them the said sum of money in the said last-mentioned Bill of Exchange contained, according to the tenor and effect of the same bill, and their acceptance thereof, as last aforesaid.

Eighth count.—And whereas also, the said Thomas Gibson and Joseph Johnson, to wit, on the 1st day of May, in the said year of our Lord 1789, at London aforesaid, at the parish and ward aforesaid, were indebted unto the said Hughes and James Peter in the further sum of £.1000 of lawful money of Great Britain, for so much money by the said Thomas Gibson and Joseph Johnson before that time had and received, to and for the use of the said Hughes and James Peter: and being so indebted, they, the said Thomas Gibson and Joseph Johnson, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid at London aforesaid, at the parish and ward aforesaid, undertook, and to the said Hughes and James Peter then and there faithfully promised to pay them the said last-

mentioned sum of money, whenever they should be thereunto after requested.

Ninth Count.—And whereas also, the said Thomas Gibson and Joseph Johnson, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, were indebted unto the said Hughes and James Peter, in the further sum of £.1000 of like lawful money, for so much money by the said Hughes and James Peter before that time paid, laid out and expended, to and for the use of the said Thomas Gibson and Joseph Johnson, at their like instance and request; and being so indebted, they the said Thomas Gibson and Joseph Johnson, in consideration thereof, afterwards, to wit, the same day and year last aforesaid, at London aforesaid, at the parish and ward aforesaid, undertook; and to the said Hughes and James Peter then and there faithfully promised to pay them the said last-mentioned sum of money, whenever they should be thereunto after requested.

Tenth Count.—And whereas also, the said Thomas Gibson and Joseph Johnson, afterwards, to wit, on the same day and year last aforesaid, at the parish and ward aforesaid, were indebted unto the said Hughes and James Peter in the further sum of £.1000 of like lawful money, for so much money by the said Hughes and James Peter before that time lent and advanced to the said Thomas Gibson and Joseph Johnson, at their like instance and request: and being so indebted, they the said Thomas Gibson and Joseph Johnson, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, at London aforesaid, at the parish and ward aforesaid, undertook, and to the said Hughes and James Peter, then and there faithfully promised to pay to them the said last-mentioned sum of money, whenever they should be thereunto afterwards requested.

Breach.—Nevertheless, they, the said Thomas Gibson and Joseph Johnson, not regarding their said several promises and undertakings, so made as aforesaid; but contriving, and fraudulently intending craftily and subtilly to deceive and defraud the said Hughes and James Peter, in this behalf, have not, nor hath either of them, although often requested, paid to them, or either of them the said several sums of money, or any of them, or any part thereof: but to pay the same to them, or either of them, have hitherto altogether refused, and still do refuse, to the damage of the said Hughes and James Peter of £.1600. And therefore they bring their suit, &c.

Plea,—And the said Thomas and Joseph, by Joseph Kaye, their Attorney, come and defend the wrong and injury, when, &c. and say, that they did not undertake and promise in manner and form as the said Hughes Minet and James Peter Feſtor have above thereof complained against them; and of this they put themselves upon the country, &c. And the said Hughes Minet and James Peter Feſtor do the like:—therefore, the Sheriffs are commanded, that they cause to come before our Lord the King, in three weeks of the Holy Trinity, whereſoever he ſhall then be in England; twelve, &c. by whom, &c. to recognize, &c. and who neither, &c. becauſe, as well, &c. the ſame day is given to the parties aforeſaid, there, &c.

At the Trial, Mr. Bearcroft, Counſel for the Plaintiff's contended, that if he eſtabliſhed the fact, that Gibſon and Johnson accepted this bill, with the full knowledge that it was drawn in favour of a fictitious payee, the Plaintiffs would be entitled to recover.

When a man accepts a Bill of Exchange, he undertakes to pay the value of that bill to any perſon who has a right to receive it. In this caſe, the Defendants may, perhaps, ſay to the Plaintiffs, prove your title under John White, as firſt payee. But if it is ſhewn that John White does not exiſt, this is impoſſible. And if White is nobody, the Defendants can run no riſk in paying the amount of this bill to the Plaintiffs, who are honeſt, *bona fide* holders of it.—When Liveſey and Co. drew this bill on Gibſon and Johnson, they choſe to make it payable to John White, that is, to a perſon who has no exiſtence. The conſequence was, that this bill was ſtill in the power of Liveſey and Co. In its effect, it muſt be conſidered as a bill payable to bearer. It is payable to thoſe who have choſen to act in the name of John White. It is payable to the Plaintiffs, who have purchaſed it for a fair and full conſideration. They, and they only, are entitled to recover.

Evidence for the Plaintiff.

Robert Booth.—I was one of the Clerks of Liveſey and Co. This bill is the hand-writing of Mr. Smith, who is one of the partners in the houſe of Liveſey and Co.

The acceptance is the hand writing of Mr. Johnson.

I do not know any perſon of the name of John White, in whoſe favour this bill is drawn. The indorſement of John White on the back of it, is the hand-writing of one of the clerks of Liveſey and Co. I know it was the practice of the houſe of Liveſey and Co. to draw bills on Gibſon

son and Johnson, payable to fictitious persons, and of Gibson and Johnson to accept those bills. They were in the habit of doing business in this way. I have very often carried bills from the drawers, Livesey and Co. to Gibson and Johnson, for acceptance. In general, they were payable to fictitious persons. I cannot say whether Gibson and Johnson knew this circumstance. I have carried five or six different bills at once, drawn in favour of fictitious payees, to the house of Gibson and Johnson, for acceptance. Those bills I have carried for acceptance the instant they were drawn, and while the ink was quite wet. They were undorsed, and dated Manchester. Livesey and Co. had one house at Manchester, and another in London. I cannot recollect any instance where those bills were indorsed. Gibson and Johnson accepted them directly.—They knew me perfectly.—They knew that I was one of the clerks of Livesey and Co. I very often saw Mr. Johnson, and he frequently gave them to a clerk to enter.

After I had carried one parcel of bills to the house of the Defendants for acceptance, I have, sometimes, immediately after taken another parcel.

Other witnesses were called, who proved to the same effect, but as their evidence is noticed in the Chief Justice's Charge to the Jury, it is here omitted.

CHARGE TO THE JURY.

LORD KENYON.—Gentlemen of the Jury: I shall not trouble you at present with many observations, as the cause has been discussed at great length by the Counsel on both sides; nothing that I can say will contribute much to your assistance.—The question now to be decided is reduced to a single question of fact, and that question is of great importance to the parties immediately concerned, the amount of the bill being near £.800; but this case is of infinitely more importance to the commercial world. All questions respecting commerce are of infinite importance to a commercial country.

We find the parties in this cause drawing bills to the amount of one million a year. This is also of great importance.

It is admitted, that in *Bills of Exchange*, which are drawn in favour of existing persons, it is absolutely necessary that those persons in whose favour such bills are drawn, should indorse them. This gives title to the bearers, and nothing should change this legal position.

It is also of infinite importance that the law should be known; and that the justice that is administered to private individuals, by trampling on the ground of law, is purchased at a price infinitely too high.

The question, as considered by the Counsel for the Plaintiffs, leaves this ground of law untouched.

What the question in this cause is, must be collected from the record: and you are now to decide between the parties.

One of the counts, as it is called, or one of the states of the case, is this: That a bill was drawn, payable to John White, or Order, for £. 721 5 s.—that no such person existed;—that an indorsement was made on this bill, purporting to be the indorsement of John White;—that this bill was afterwards accepted by the Defendants in this cause;—and that although they had so accepted this bill, they knew perfectly that no such person as John White existed.

These are the several facts which the Plaintiffs say constitute such a case as entitles them, in point of justice, to appeal to the laws of their country for redress.

That the bill was drawn in favour of John White, is admitted; and though, *in rerum naturâ*, such a man might exist, yet no such man existed for the purpose of this bill. That the bill has been paid, is proved. All is proved in favour of the Plaintiffs, except one fact, namely, that the Defendants knew that John White had no existence. This is the single question to which this cause, important to the parties, but more important to the commercial world at large, is now reduced. Whether this was so or not, is to be made out, not by direct evidence, but from those facts which have been laid before you by the witnesses on both sides.

In order to prove that the house of Gibson and Johnson accepted and paid all bills that came to them, drawn by Livesey and Co. without considering whether the payee really existed, I shall only state the material parts bearing on this point, without going over all the evidence.

Robert Booth, clerk to Livesey and Co. said, that he had taken many bills for acceptance to Gibson and Johnson the instant they were drawn, and while the ink was moist; that these bills were unindorsed, and in a multitude of instances paid. Gibson and Johnson knew perfectly that he was one of the clerks of Livesey and Co.

The next witness, John Collier, said, that if the transactions had been regular, the payees would have been the per-

persons to have carried those bills to the house of Gibson and Johnson for acceptance.

The clerks of Gibson and Johnson sometimes carried away bills from the house of Livezey and Co. for acceptance.

That the clerks of Livezey and Co. had filled up bills and indorsed them, in the presence of John Hawkins, clerk to Gibson and Johnson; and that Hawkins, immediately after, carried them to the house of the Defendants for acceptance.

Supposing this to be so, it was certainly pretty notorious to the house of Gibson and Johnson that those bills were not made payable to real, but to fictitious persons.

The evidence of these parties, and the weight and consequence that is due to it, is peculiarly within your jurisdiction.

In opposition to this, on the part of the Defendants, they call Samuel Tudman, formerly one of the clerks of Gibson and Johnson, and now clerk to their assignees. He said, that no bill, to his knowledge, was drawn in favour of a non-existing person. The same thing was also proved by Joseph Poole, who stated, that he had been frequently at the house of Livezey and Co. and had never seen any of their clerks either fill up bills or indorse them;—that he had no suspicion that any of those bills were payable to fictitious persons, nor had the smallest reason to believe that Gibson and Johnson had any such knowledge.

John Hawkins said, he thought he sometimes knew the hand-writing of the indorsers; but when he asked those persons whether such indorsements were their hand-writing, they always denied it, or gave him evasive answers.

He suffered those bills to be paid, and did not communicate his suspicions to his principals.

I would not say any thing harsh of a young man, but surely his conduct was a little inadvertent in this business.

This is all the evidence; and it is for you to say, whether that which the declaration states to be the case was the case; namely, whether this bill was accepted under a colourable pretence, and merely for the purpose of giving it the semblance of a real transaction.

I admit the law to be as laid down by the Counsel for the Plaintiffs; when you look at paper, you ought to consider the parties to the transaction. It is not the words of a deed, but the substantial effect of it in the eye of the mind, that ought to govern the transaction.

It is for you to decide on this point. The constitution of the country has given you a jurisdiction over it.

and I am certain you will do substantial justice between the parties.

The Jury found a Verdict for the Plaintiffs. Damages £.721 5s.

The Case was afterwards brought before the Court of King's Bench upon motions on the part of the Defendants for a new trial, and also in arrest of judgment: when a Special Verdict was drawn up as follows, and afterwards carried to the House of Lords by way of appeal.

“ That the said persons using trade and commerce as co-partners, in the co-partnership name and firm of Livesey, Hargreave and Company, on the 18th day of February, 1788, at the place within-named, made a certain instrument in writing, (the hand of one of the said co-partners, on their joint account, and in their co-partnership name and firm of Livesey, Hargreave and Company, being thereunto subscribed), and directed the same instrument to the said Thomas Gibson and Joseph Johnson, by the names and description of Messrs. Gibson and Johnson, Bankers, London; and which said instrument is in the words and figures following to wit:

£.721 5s.

Manchester, Feb. 18, 1788.

Three Months after Date, pay to Mr. John White, or Order, Seven Hundred Twenty-one, Pounds, 5s. Value received, with or without advice.

Livesey, Hargreave and Co.

To Messrs. Gibson and Johnson,
Bankers. London.

G. & J.

And the Jurors aforesaid, upon their oaths aforesaid, further say, That the said Livesey, Hargreave and Company, at the time of making the said instrument, well knew that no such person as John White, in the said instrument mentioned, existed. And the Jurors aforesaid, upon their oaths aforesaid, further say, That afterwards, at the day and place within-mentioned, a certain indorsement in writing was made by the said Livesey, Hargreave and Company, upon the said instrument, purporting to be the indorsement of John White, named therein, and to be subscribed with his hand and name: and, that the said indorsement purported to require the said sum of money, in the said instrument contained, to be paid to the said Livesey, Hargreave and Company, or their Order. And the Jurors aforesaid, upon their said oaths, further say, That the said instrument being so indorsed as aforesaid, they, the said Livesey, Hargreave and Company, afterwards, at the day and place within-

within-named, by a certain indorsement in writing made upon the said instrument, and subscribed with the hand and name of one Absalom Goodrich, by procuration of the said Livesey, Hargreave and Company, appointed the said sum of money, in the said instrument contained, to be paid to the said Hughes Minet and James Peter Fector; and then and there delivered the same so indorsed, as well with the name of the said John White, as with the name of the said Absalom Goodrich, to the said Hughes Minet and James Peter Fector, for a full and valuable consideration in money, therefore then and there paid by the said Hughes Minet and James Peter Fector, to the said Livesey, Hargreave and Company. And the said Hughes Minet and James Peter Fector, then and there became, and were, and still are, the holders of the said instrument. And the Jurors aforesaid, upon their oaths aforesaid, further say, That the said instrument was afterwards, at the day and place within-mentioned, presented to the said Thomas Gibson and Joseph Johnson, for their acceptance thereof, and that the said Thomas Gibson and Joseph Johnson then and there accepted the same; they the said Thomas Gibson and Joseph Johnson, then and there well knowing that no such person as John White, in the said instrument named, existed; and that the name of John White, so indorsed thereon, was not the hand-writing of any person of that name. And the Jurors aforesaid, upon their oaths aforesaid, further say, That the said Thomas Gibson and Joseph Johnson, at the time of making and accepting of the said instrument as aforesaid, had not, nor had they at any time since, any money, goods, or effects whatsoever, of, or belonging to the said Livesey, Hargreave and Company, or of the said Hughes Minet and James Peter Fector, in their hands. And the Jurors aforesaid, upon their oaths aforesaid, further say, That the said Thomas Gibson and Joseph Johnson, although often requested, have not paid the said sum of money contained in the said instrument, or any part thereof, to the said Hughes Minet and James Peter Fector, or either of them, and that the same still remains unpaid; but whether upon the whole matter aforesaid, found by the said Jurors in manner aforesaid, the said Thomas Gibson and Joseph Johnson are liable to the payment of the said sum of money in the said instrument mentioned, or not, the said Jurors are altogether ignorant, and pray the advice of the Court here, in the premises. And if, upon the whole matter aforesaid, found by the said Jurors in manner aforesaid, it shall appear to the Court here, that the said Thomas Gibson and

Joseph Johnson are liable to the payment of the said sum of money, in the said instrument mentioned, then the said Jurors upon their oath say, that the said Thomas Gibson and Joseph Johnson did undertake and promise, in manner and form as the said Hughes Minet and James Peter Feñtor by their declaration have declared against them. And they assess the damages of the said Hughes Minet and James Peter Feñtor, on occasion of their not performing the promises and undertakings within specified, over and above their costs and charges, by them about their suit in that behalf expended, to £.721 5s. And for those costs and charges to 40s. But if, from the whole matter found by the Jurors, in manner aforesaid, it shall appear to the Court here, that the said Thomas Gibson and Joseph Johnson are not liable to the payment of the said sum of money in the said instrument mentioned, then the said Jurors upon their oaths say, That the said Thomas Gibson and Joseph Johnson did not promise and undertake in manner and form as they have within by their plea alledged.

HOUSE OF LORDS.

IN ERROR.

Thomas Gibson and Joseph Johnson, *Plaintiffs in Error.*
and
Hughes Minet and James Peter Feñtor, *Defendants in Error.*

CASE FOR THE PLAINTIFFS IN ERROR.

Upon the judgment of the Court of King's Bench, a writ of error was brought returnable in Parliament; and the Plaintiffs in error having assigned general errors, and the Defendants in error having pleaded that there was no error in the record of the proceedings, the said Plaintiffs in error hoped that the said judgment would be reversed, for the following among other

R E A S O N S.

- I. Because by the law and custom of merchants there are two species of negotiable instruments, or Bills of Exchange, essentially different in their natures, the one payable to order, and the other to bearer; the former being only negotiable by indorsement, and the property in the latter being transferrable by mere delivery.
- II. Because instruments of this description are in the nature of specialties and are by law permitted to be declared upon as such; and the count upon which the Court have given judgment, setting forth and stating a bill payable to bearer,

bearer, when the bill or instrument produced in evidence purports to be a bill payable to order, is not supported by the evidence.

- III. Because the legal effect of every instrument must arise out of, and be collected from the words of it; and no parole evidence, or extrinsic circumstances can give to it a meaning or operation contrary to, or different from, that which appears on the face of the instrument itself.
- IV. Because in the case of instruments, the property of which passes by indorsement, it is peculiarly necessary that there should be persons in existence answering to the names indorsed upon such instruments, in as much as additional credit is derived to them from the number of indorsements made upon them, the consequent appearance of their having passed through an extensive circulation, and the apparent liability, therefore, of a greater number of persons to the payment of the money contained in them.
- V. Because the facts found by the Jury amount to the statement of a fraud and forgery, which can never give legal effect to an instrument, nor be the foundation of a contract within the custom of merchants; which custom must be founded in convenience, be consistent with reason, and sanctioned by usage: and consequently, as the count on which the judgment for the Defendants in error is given declares on a bill drawn according to the usage and custom of merchants, the evidence does not support such declaration.
- VI. Because judgment being given for the Plaintiffs in error, on those counts which specially state the circumstances that have been found by the Jury, it follows, that they are entitled to it on that account, to the support of which the facts so found are the only evidence; otherwise it must be decided, that a transaction, which, stated upon the record in an action upon the case, is not sufficient to found a contract, or to make the party charged liable, will, when found specially by a Jury, and put upon the record in the shape of a Special Verdict, be sufficient to found a contract, and to support a count, stating a contract of a different nature.

T. ERSKINE.
F. BOWER.

THE CASE OF THE DEFENDANTS IN ERROR.

The Defendants in error prayed the judgment of the Court of King's Bench to be affirmed, with costs, for the following, among other

R E A S O N S.

- I. It appears by the Special Verdict, that the Defendants in error are fair, *bona fide* holders of the bill in question, for a valuable consideration: and Livesey, Hargreave, and Company, the drawers, at the time when they drew the bill, as well as the Plaintiffs in error, Messrs. Gibson and Johnson, when they accepted it, are found to have been perfectly informed of the non-existence of White, to whom, or to whose order, the form of the bill makes the contents of it payable. The Defendants in error, therefore, are in a situation which entitles them to all the aid which, consistently with established legal principles, can be given by a Court of Justice: and the Plaintiffs in error having acted under no mistake or apprehension, and not being in any respect interested in the existence or non-existence of White, have no equitable claim to be released from the effect of their engagement, or to prevent the application of any favourable rule of construction, to support the demand of the Defendants in error.
- II. It is not necessary to the validity of deeds or contracts, that they can in all cases operate according to the words in which they are expressed; when the rules of law prevent such operation, the instrument may legally operate in a different manner, to give effect to the legal intent of contracting parties. Thus words of demise may operate by way of confirmation; and, *vice versa*, words of grant by way of covenant; and so in many similar instances. The intent of the drawers and acceptors of the bill in question, was to make a negotiable instrument; and if for want of an actually existing payee, nominated in the bill, it could not be so indorsed as to be put in a state of negotiability by indorsement, it is humbly conceived that there is no rule of law to prevent its being transferred by delivery, and having the effect of a bill expressed to be made payable to bearer, that being the only other method of negotiating bills of exchange: and it is also conceived that the fifth count of the declaration, which states the bill according to its legal effect and operation, is properly adapted to the case, and that the judgment thereon is warranted by the verdict. By thus giving effect to the bill, justice is done betwixt the parties, and the rule affords protection to the fair holder of Bills of Exchange against frauds; by which they might otherwise be injured; without which protection, the currency of bills of exchange would

would be greatly obstructed, and great inconveniences would arise in commercial transactions.

- III. It is objected, that the defendants in error make title to the bill through the medium of a felony; but, supposing the indorsement of the name of White to have been a felonious act, the present action is not brought against the person who committed the felony, or for the felonious act: and it has been decided, that the *bona fide* holder of a stolen Bill of Exchange might maintain an action upon the bill, though it had been negotiated to him through the hands of the person who stole it.—In the present case, however, the question does not arise; for the verdict finds no intent to defraud; and, consequently, no felony is found, nor can be intended.

E. BEARCROFT.

J. MINGAY.

A. CHAMBRE.

On the Argument of this case in the House of Lords, the Lord Chancellor referred to the Twelve Judges these three questions:

- I. Whether the making of the instrument declared upon appears upon the Special Verdict to be so criminal, that the policy of the law will not suffer an action to be founded on such an indictment?
- II. Whether upon the matter found in the Special Verdict, the bill mentioned in the fifth count can be deemed in law a bill payable to bearer?
- III. Whether the matter of the Special Verdict will sustain any other count in the declaration?

And on the 3d of February, 1791, the Judges delivered their opinions, *seriatim*, to the House.

Mr. Baron Hotham began with delivering his opinion upon the questions submitted to the Judges, and said, it seemed to him, that the matter found in the Special Verdict was sufficient to warrant their Lordships in saying, that the making of the instrument declared upon was not so criminal that the policy of the law would not suffer an action to be founded upon it.

On the second question.—Whether the facts contained in the Special Verdict would sustain the fifth count of the declaration, that this was a bill payable to bearer?—he submitted to their Lordships, that it was impossible not to feel that the parties to this bill, the drawers and acceptors, notwithstanding their plausible endeavours, ought not to be permitted to avail themselves of their own fraud; an attempt

which the law would in no case endure, much less assist. Unless, therefore, some stubborn rule of law stood in the way of the judgment of the Court of King's Bench, it ought in his opinion, to be supported.—It was admitted, that many cases might be put, in which deeds and solemn instruments were not always to be construed, or to have effect, according to their obvious or literal import, but that they should have such an operation, as would carry the intent of the parties into execution, though contrary to the strict letter of the instruments themselves. This principle of law, in his apprehension, would apply directly to the present case. The bill in question imported to be a Bill of Exchange, payable to John White, or his order, but in truth and in fact it was not so.—It never was, and it never could be so, because there was no such person existing as John White. This was a fact known to the acceptors as well as to the drawers; so that the bill, so viewed, was contrary to the principle that operated on deeds and other instruments; they must therefore have recourse to the intention of the parties, which, in the present case, was clear. It was impossible for the holders of this bill to prove their title through John White, who had no existence, and who the Plaintiffs in error knew did not exist; and therefore when they accepted the bill, they must have intended to have come under an obligation to somebody, otherwise their acceptance was idle and absurd. If therefore they had accepted this bill, they should be bound by their undertaking; for it was a known rule of law, that no man should take advantage of his own wrong.

The difficulty on the form of the bill arose from no mistake, but from a deliberate and concerted act of the acceptors and of the drawers. But it was still in their power to give effect to this bill—Should they then be obliged to do so? It might not be too much to say the acceptor's intention was, that it should be payable to the bearer; for they knew the bill had no indorsement on it by John White; they knew it came into the hands of Minet and Feñor from Livesey, Hargreave, and Co.—It was sent as a bill payable to bearer.

He contended, that it was not possible for these partners in fraud to say, we have accepted this bill, but we meant nothing by it but to cheat all mankind. Nor should they be permitted to say, that it was not according to the law and custom of merchants.

He said, the great principle that he went upon was, that parties to a bill should not, any more than parties to any deed or instrument, take advantage of their own wrong. The
Plaintiffs

Plaintiffs in error having accepted this bill, with the privity that John White was a fictitious payee, and that the holders could not derive title through him, the law would presume that they intended that ceremony should be waived. That this bill might be paid, the law would conclude that it was the intention of the acceptors to pay it to any *bona fide* holder; or, in other words, that it should be considered as a bill payable to bearer.

He conceived that such a construction would be more conformable to the import and effect which ought to be given to all commercial transactions, as well as to true policy and the principles of substantial justice. It was of the greatest importance that men's undertakings should be executed, and their promises to pay performed.

The rule of law, that a man's own acts should be taken most strongly against himself, extended to all engagements and undertakings. He conceived the acceptors of this bill would not be permitted to say, we never intended to pay. The law would hold them more strongly to their engagement, on the ground of their own fraud, and would consider the bill as capable of being transferred by delivery.

A Bill of Exchange amounted to no more than an authority on the one hand, in the person to whom it was made payable, to make a demand; and, on the other, to an undertaking by the acceptor that he would pay. The acceptor put himself in the situation which made it obligatory on him to pay the bill, either in the very terms of it, or according to its legal operation, as in this case, where the name of John White must be looked upon as nothing,—as a non-entity,—and the bill must be considered as payable to a real, existing person; that is, to the bearer.

He was of opinion that the judgment of the Court of King's Bench would afford a proper security to paper circulation, would tend to the support of public credit, and prove most beneficial to the great interests of trade and commerce. But the most fatal consequences must necessarily ensue if the acceptors of bills were permitted to set up their own fraud as a justification, and were to refuse to pay any *bona fide* holder for a fair and full consideration.

On this question, therefore, his Lordship was of opinion, that, upon the matter found in the Special Verdict, the bill, as mentioned in the fifth count, might be considered as a bill payable to bearer.

But, thirdly, suppose the facts found by the Jury, and stated in the Special Verdict, would support the fifth count, which described the bill as payable to bearer, there was a third question to be considered,—Whether the matter in the Special Verdict would sustain any other count in the declaration? His Lordship was of opinion, that it would also sustain the first count, by considering the bill as a new bill, by the subsequent indorsement of Livesey, Hargreave and Co.—For every indorsement was in the nature of a new bill, and had the same effect as if they had originally drawn the bill, without the name of John White, payable to themselves, or their own Order. From the moment, therefore, this second indorsement appeared on this bill, Livesey, Hargreave and Co. gave a new title to it, and a fresh authority to pay to their own Order. The acceptance of Gibson and Johnson was subsequent to such indorsement; and therefore that acceptance, he conceived, must be coupled with the knowledge which they were bound to have of this second indorsement, by Livesey, Hargreave and Co.—and knowing that, although there was on the bill a fictitious indorsement, there was also on it a real one. In that view of it, his Lordship considered the acceptors as liable under the first count.

Mr. Baron Thompson, Mr. Baron Perryn, and Mr. Justice Gould, gave their opinions to the same effect.

The Lord Chief Baron said,—With respect to the criminal nature of this instrument, there was enough perhaps to have warranted both the drawers and acceptors to have stood at a different Bar; but as this did not appear on the face of the Special Verdict, the policy of the law would not suffer Judges to infer it. Upon the first question therefore they were all agreed; and for that reason he should forbear saying more upon this preliminary point.

He next adverted to the different counts in the declaration, and thought there was not a pretence for saying that the matter of the Special Verdict could sustain any of the counts, except the first, second, fifth, and sixth; and that therefore the enquiry was reduced to this, Whether this Special Verdict would support any one of these four counts? This would include every thing that remained on the second and third questions.

The Court of King's Bench were of opinion, that neither the first, second, nor sixth count, could be sustained, in point of law; and this would be material on the argument on the second question. The Court gave judgment on the fifth count, and thereby decided, that when a bill

was made payable to a fictitious payee, the contents of that bill became payable to bearer. He conceived it would be extremely difficult to make out that this was a bill payable to bearer. For the facts found by the Special Verdict were in direct opposition to the facts stated in the fifth count. And, first of all, he presumed it must be admitted, that before Minet and Fector could recover on this bill, they must shew, in like manner as every other Plaintiff must shew, a sufficient title. And, in his judgment, there was a fundamental fallacy in the arguments used by the learned Judges on the other side, arising from not observing this proposition—The Plaintiffs must prove their case, and make out their title, before the Defendants were called upon to say any thing.

Bills of Exchange being of several kinds, the title to recover on any bill must depend on what kind of bill it was.—A title to recover might be derived either from the drawer, or from the original payee. In this case, the title of the original payee was apparent on the face of the bill. The title derived from that payee was a title by assignment, a title which the common law did not acknowledge, and, as he apprehended, could not make; a title which existed only by the custom of merchants. If, by force of the custom of merchants, this was a bill payable to Order, the assignment must be by a writing on the bill, called an indorsement, appointing the contents of that bill to be paid to some third person. Every man could easily discover whether the holders of a bill claimed it under an assignment as indorsee or as bearers. The title of the bearer appeared on the face of the bill,—the title of the indorser appeared from the indorsement. Every thing that was necessary to be known respecting a Bill of Exchange, whether it was assignable by the custom of merchants, and whether it had in fact been assigned, according to that custom, would appear at once, by a fair inspection of the instrument itself. The foundation of the right of a holder of a bill payable to bearer, was his being in possession of the bill when he claimed title to it.

In his Lordship's apprehension, the wit of man could not devise any thing better calculated for circulation.—The assignable quality of a bill was a thing created in the original frame and constitution of the instrument; and the party to whom it was offered had only to read it. If a man claimed to be entitled to a Bill of Exchange, drawn in favour of a real payee, and not having an indorsement by that

payee, he could not recover on it, as on a Bill of Exchange, though he had paid a full consideration.

The present bill should, if possible, be taken to be what it imported to be on the face of it, and ought not to be governed by any private circumstances. The Plaintiffs declared on it as a Bill of Exchange, and had stated their title to that bill to be by assignment; and the custom of merchants directed that this assignment should be by indorsement; and, supposing the payee were a real person it would be impossible to be transferred in any other manner. But they said, in this case, that John White was a fictitious name, and that his indorsement was likewise fictitious. They said this fact was known to the acceptors; by reason whereof, and by the force of the custom of merchants, the acceptors became liable to pay the value of the bill to them. His Lordship said, he had looked in vain to discover where the places were to be found of this usage and custom of merchants applying to such a case. He apprehended that no logician could draw such a conclusion from such premises: he asked where that rule was to be found. If no such rule was to be found expressly laid down, was it to be collected from inference? No rule had been stated, to his apprehension, that warranted such a conclusion.

It was only by force of the usage and custom of merchants that Minet and Fector could ever recover on this instrument, as on a Bill of Exchange. The common law could never recognize their title.

His Lordship was of opinion, that this instrument was only a piece of waste paper upon which the custom of merchants never attached.

He thought that the drawers of the declaration had not made the best use of their materials.

It had been stated, that every indorsement was a new bill. He could have conceived, in a case where there was no original payee, if they had declared on a new bill drawn by those who made the second indorsement, appointing the contents of the bill to be paid to the parties to whom the second indorsement was made, that there would have been some authority for saying this amounted to a new bill.

It had been contended, on the other side, that this was a bill payable to bearer. In his Lordship's apprehension, such a bill was a mere nullity. It was not surely a very sound argument, to say, that this must be a bill payable to

the bearer, because it could be payable to no other man. If the intent of the parties was to be collected from what appeared on the face of the instrument, they must consider it as a bill to pass by indorsement. Where then was the authority for saying, that it was according to the effect and meaning of the bill, that the contents should become payable to bearer? The fifth count, therefore, had very great difficulties to encounter. How they could make that, which upon the face of it plainly purported to be a Bill of Exchange to pass by indorsement, a bill payable to bearer, he confessed, he was totally at a loss to comprehend.

It had been said, that the Plaintiffs in error, Gibson and Johnson, should never be permitted to defend themselves, by alleging that the payee was fictitious. He was ready to admit, that, by the law of England, no man should be permitted to allege his own crime; and, in that sense, he agreed that no man should take advantage of his own fraud, nor should set it up by way of defence. But still a Plaintiff must always recover by his own strength. He must prove his case; and when that was done, it should not be permitted to a Defendant to set up his own fraud, to insist that the payee was fictitious, and to shape that into a defence to answer the Plaintiff's case. But here the Plaintiffs, in making out their own case, were driven to shew the facts which the Defendants, by way of defence, were attempting to shew against them. Where the Plaintiffs could not make out a fair, *bona fide* case, the Defendants were not bound to say any thing.

Unless this instrument could be shewn to be a bill payable to bearer, against all the world, it could never be shewn to be a bill payable to bearer against Gibson and Johnson.

It had been said, that, by the judgment of the Court of King's Bench, the Plaintiff was not robbed of his title, and the parties were not permitted to avail themselves of their own fraud. He was of opinion, that it would be much better to punish fraud in a direct way, than in this indirect manner. This was a mode of procedure which he thought very dangerous.

It had been likewise stated, that there was an analogy between Bills of Exchange and Deeds; and that the same sort of construction was applicable to both. It ought to be observed, that Deeds, by the common law, had a certain operation and construction. Bills of Exchange were instruments which derived their effect from the custom of

merchants. But supposing there was some analogy between Bills of Exchange and Deeds, would it from thence follow, that a bill payable to Order could be construed into a bill payable to Bearer?

There were certain words in Deeds, which had a certain sense and known construction, according to their plain, obvious, and common import. In reading a page of history, in any language, he who would read it would interpret the words according to the meaning which they usually had in that language. His Lordship said, if Judges went one step beyond this they did not construe men's deeds, but made them. It was a fallacious argument to apply the rules of common law to the law of merchants. The fallacy consisted in this, that the distinction between the common law, and the law of merchants, had not been sufficiently attended to. It had been said, that Bills of Exchange ought to be supported. They certainly should; but if a man would demand payment of a Bill of Exchange, according to the law of merchants, he must bring his case within that law.

The Defendants in error were supposed to be innocent indorseees; and therefore it was said it was an extremely hard case upon them. But the law ought not to be stirred, much less altered, to suit this hard case. It became a hard case only by the accidental insolvency of the different parties. This was a hard case on them all.

A bill payable to a fair payee, and coming back again to the drawer, had done its duty, and ought to have been cancelled.

His Lordship said, these circumstances had weight with him, after a very careful investigation of this case.

He confessed himself to be a very incompetent judge of the interests of commerce.—He might be ignorant on this subject; but he took the interests of commerce to be deeply concerned to support fair credit, and to discountenance false credit. He took it that the interests of gentlemen who dealt in the discounting of paper money, and the interests of commerce, were not exactly the same. Trade might receive a deep wound from the failure of a number of capital houses, when the dealers in paper might receive twenty shillings in the pound, by proving their debts under twenty different commissions. While their Lordships were attending to the interests of the holders of bills, circumstanced like that under consideration, they ought not to forget the interests of the trade and commerce

merce of the country. To support such instruments as this, was to encourage a spirit of loose adventure,—a spirit of gaming in commerce,—a spirit of fraud of every kind, the weight of which must necessarily cramp and depress every honest man who traded on his own capital.

Said his Lordship, Let us not deceive ourselves.—No evil can arise by giving judgment against these bills; but if such bills are recoverable in a Court of Law, there will always be found people who will avail themselves of the advantages to be derived from the negotiation of such bills;—this paper money will go on, and where the mischief will end, no man can foresee.

He said, these were the ideas he entertained upon this important cause.

He was clearly of opinion on the second question, that the facts found by the Jury, and stated in the Special Verdict, were not sufficient to support the fifth count in the declaration, which set out this bill as a bill payable to bearer.

And, thirdly, his Lordship was of opinion, that the matter in the Special Verdict would not sustain any other count in the declaration. For these reasons, his Lordship concluded with giving it as his opinion, that the judgment of the Court of King's Bench ought to be reversed.

Mr. Justice Heath concurred with the Chief Baron.

On Monday, the 14th of February, 1791, the House of Lords proceeded to give judgment in this case.

LORD KENYON began with observing, that this question was of extreme importance to the parties concerned, as well as to the public. The question was, Whether upon this bill of exchange the Plaintiffs had a right to recover?—If their Lordships could support this bill according to the nature of the contract, undoubtedly they would be glad to do it, and make it subservient to the honesty of the case.

There being no such person as John White existing, a title to this bill could not be deduced conformable to the very words of the instrument. In order to make out a title to the bill, the indorsement of John White must be proved. This could not be done in this instance, because the Special Verdict had found that no such person existed. If there were positive rules of law, which said that no instrument could operate at all, unless it operated in the very terms in which it was written, melancholy indeed must be the case of many persons. One of the learned judges who discussed this bill very much at length cautioned the Judges against removing the land-marks of the law, and that it would be much better

that all these bills should fall to the ground, than that there should be the least danger of any thing of this sort.—Another learned Judge had observed, that they ought to follow the temperate rules of law. His Lordship said, it was by such rules that he meant to square his conduct; and he hoped their Lordships would square their conduct by the same rules.

From the nature of this bill, it could not be negotiated in the terms in which it was drawn. The question was, Whether there was any rule of law which prevented its being negotiated according to its legal effect and operation?

It had been asked, could any thing have effect that was founded in forgery? His Lordship said, that very far back bills, founded in forgery, had an effect; and there were some late cases which fully recognized this doctrine.—If a bill was forged, and a party accepted it as a true bill, no man would say that it was competent for the acceptor to prove that this bill was forged—There was nothing therefore in this part of the argument.—Were all instruments therefore so constructed as to have no effect? There was the case of a Bill of Exchange, which came extremely near to this, decided before Lord Mansfield, at *Nis. Prius*, in 1769. His Lordship held, in that case, that the holder was entitled to recover. Besides, this was agreeable to the ideas of all the most enlightened and respectable merchants of the city of London.

In the case of a note to this effect:—"Received the sum of five hundred pounds (or any other sum), which I promise never to repay;—his Lordship said an action had been brought upon such a note, and it had been held the holder was entitled to recover.

His Lordship observed, that he might reason by analogy from a variety of other cases that had been cited at the bar, and which had received no answer. Deeds operated in any manner, in order to effectuate the intentions of the parties.

His Lordship said, he was rather surprised at an observation made by one of the learned Judges,—that Deeds admitted of a more lax construction than Bills of Exchange. This doctrine was new to him. In Deeds that were intended to act on real property, and where the assistance of conveyancers were called in, he should have thought as much strictness, at least, ought to be observed in the construction of instruments of that sort, as in Bills of Exchange, which were drawn by men of plain, common sense, who were engaged in trade, and who had no legal assistance.

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It had been said, it would be very hard if some remedy were not to be given to the party who had paid a valuable consideration for this bill. But, say they, the Plaintiffs ought to have brought their action *ex delicto* against the acceptors.

His Lordship said, this was a remedy not negotiable in its nature;—it could not be transferred, and died with the party who was guilty of the fraud. An action, *ex contractu*, was against the party entering into the contract, and did not die with him.

His Lordship said, he had always understood, in cases of fraud, that, unless the Jury drew the conclusion, the law was not to admit it. The Jury not having found any fraud in the Special Verdict, it was impossible for the Judges to say there was any fraud in the transaction.

His Lordship observed, that, after all the consideration he had been able to give this case, he was still of the same opinion, and thought that the judgment of the Court of King's Bench ought to be affirmed.

The Lord Chancellor said, he did not propose to trouble their Lordships much at length with his sentiments on this subject; and though he had the misfortune to differ from so many of the Judges, he was extremely glad it had come to be heard before persons of so much knowledge, experience, and practice, in the law, as to command their Lordships' attention and acquiescence: for he was very ready to say, if wise persons pronounced any thing to be law which he could comprehend, on their authority he should think himself bound to obey it.—He did not know how he could go further.—He had a personal knowledge of the noble and learned Lord who spoke last, and not of him only, but of the temper of all the Courts in Westminster Hall. He knew the learned Judges were not so anxious to have their opinions thought right, on a new and intricate subject, as they were to lay down such principles as would apply to all such cases, and which would be an eternal rule on all subjects of a similar nature.

The case in the Common Pleas went on the same point with this.

His Lordship adverted to the Special Verdict. He said, Livesey, Hargreave and Co. made something in the form of a Bill of Exchange, and payable to the name of John White, or Order. He supposed the name of John White would suit fifty people in every county of England. But their Lordships were not to consider it in that point of view, because the Jury had found that no such person existed. After this

think was so drawn, the name of John White was indorsed upon it by the drawers themselves; after it had been so indorsed, the drawers indorsed it again, and paid it into the hands of the present Plaintiffs.—By the Special Verdict, the Plaintiffs were not found to have any cognizance of the fraud.—The bill being drawn in this way, it was important to say, whether there was no fraud. All the Judges who were in favour of the present decision, were of opinion there was no fraud, because none was stated in the Special Verdict.

The reason of making it payable to their own Order, under the name of John White, was to give it greater currency. It was to give countenance to a thing which was unreal, and which, in his Lordship's apprehension, must be deemed a fraud. Livesey, Hargreave and Co. likewise wrote the name of John White on the bill. The Plaintiffs held this bill by assignment. There was a distinction between bills. One set of bills was payable to Order, and by the custom of merchants might be assigned, though by the common law they could not. The person who put his name on the back of a bill was an indorser; and he warranted the bill so far, that if an action was brought against him, stating him to be an indorser, it would be good, if the indorsement was proved to be his hand-writing, even if all the matter were found that had been found in the present case. In an action against an indorser, it was immaterial what the bill was before the indorsement, since the indorser warranted it. One of the learned Judges, in observing upon bills payable to bearer, seemed to think, if he understood him right, that they passed by assignment, and the difference between them and bills payable to order consisted in this, that in the last case the assignment was by writing in the first case, by delivery.

His Lordship conceived this was a mistake. The bearer of a Bill of Exchange did not claim through the hands through which it came. This was not material to the undertaking of the acceptor. His undertaking was to pay to the bearer; and if the bill had passed through an hundred hands, the last bearer was as much the original hand, as if it had never been in the possession of any other person.

After the best consideration he was able to give this case, he thought the first count came extremely near the point. If the defendants in error had given money to the drawers for this bill, and the acceptors had known that they had done so, and on that account had accepted the bill, he conceived this would have been an undertaking to pay the debt of another:—For, in that case, the drawers would have been indebted to the holders, and the acceptors would have been

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apprized of that circumstance; and the consideration would have been, that they, by interposing their credit, would have prevented the holders from going back on the drawers. It would not have been a *nudum pactum*.

His Lordship thought that the criminality of this instrument ought to prevent the holders from bringing an action on it. He was rather inclined to go on the fair and clear rules of law, let the loss fall where it would, than to strain a rule of law to do substantial justice in a particular case.—For by this you did a great deal more harm to the publick, than you did good to individuals.

The next question that arose in this inquiry was,—Whether this was a good bill on the 5th count? He thought it material to know when this instrument began to be a bill payable to bearer. Did it begin, in the language of the sixth count, after it came into the hands of the holders, and before they carried it to the acceptors?—Suppose the holders of this bill had known that John White was a nominal person at the time they took it; he should wish to know, whether in that case it would have been a bill payable to bearer; he wished also to know, if this bill had been lost, and had got into the hand of a stranger without any of those names upon it, whether that stranger could have come to the acceptors and demanded payment. Could he have recovered in an action against the acceptors, and have put the indorsement out of doors?

His Lordship thought it was a considerable stretch to make this a bill payable to bearer. It was not very agreeable for him to contend against an authority which he felt overwhelming him at the very time he was speaking.

As a measure of general policy, it was of extreme importance that transactions of this kind should be stopped. Fictions on bills would be the constant course, if such Lordships made such bills payable to bearer.

With regard to its being a hard measure, he observed there must be some remedy. The law always found a proper remedy for every injury.

He said he had reduced the question fairly to this ground:—Was it ever, according to the avowed policy of the law of England, that the contents of a Bill of Exchange should be proved by any thing but by the words of the bill? He conceived that no bill could have a sense introduced upon it but what was agreeable to the words of the bill; and it was from having deviated from that rule, that he found fault with the present judgment. If they said that a Bill of Exchange was what it purported one the face of it be, the 1

what he had to expect; and would not be afraid of advancing his money:—But if they held that a bill, which on the face of it appeared to be payable to order, was a bill payable to bearer, it was impossible for the holder to know what would happen. The Court of King's Bench had given a judgment on this bill contrary, not only to all the notions which the holders had on the subject, but contrary to every expectation which they could possibly entertain when they took it. They took it as a bill payable to order, and by accident it turned out at last to be a bill payable to bearer:—*Præter spem, et præter voluntatem eorum.*

His Lordship next adverted to the *nisi prius* decision of Lord Mansfield in 1769. The note which he had got of that case, he said, was somewhat different from what had been stated.

His Lordship conceived that case did not apply to the present; because Lord Mansfield said, that he would not permit parties to avail themselves of their own fraud; and held, that the instrument should be considered to be what it purported to be on the face of it. But, in the present case, the direct contrary was attempted. They wished to convert a bill, which on the face of it purported to be a bill payable to Order, into a bill payable to bearer. He conceived, that more authority had been given to that case than Lord Mansfield intended. He thought, if this judgment could be maintained at all, it must be on the first count, which had stated the whole matter of the Special Verdict. If he were to support the judgment on any count, he should wish to support it on the first. It was not a Bill of Exchange, assignable according to the law and custom of merchants, but it was an undertaking.

It had been said, this judgment might be supported from analogy to the conveyances of real estates. If so, they might make a bill of exchange different from what the substantial justice of the case required it should be made, in order to give the Plaintiffs a means of recovering. He thought this proposition was monstrous, and infinitely too large to be maintained.

Bills payable to order, and bearer, were two totally different things.

In Deeds, there must be certain words used, as *dedi, concessi*, &c. and without them the conveyance would be void. There must be a subject grantable;—there must be a person capable of granting:—and there must be a person capable of receiving.

In like manner he conceived there must be a certain form of words used in bills payable to order, and a different form in

in bills payable to bearer. It must appear clearly on the face of the bill, whether it be a bill payable to order, or a bill payable to bearer.

His Lordship conceived it was impossible the judgment could be sustained on the first count. He saw no ground on which it was possible to affirm this judgment: and, if it was affirmed, their Lordships ought not to forget the numerous inconveniencies that would attend the transactions of commercial men. Who was to know that John White was a mere fiction? When was this to be known?—When the holders come against the acceptors, they refuse payment, and stand an action;—and at last the holders are told that the instrument, which they took as a bill payable to order, was a bill payable to bearer. Let it be fraud, or not fraud, to make such an instrument, it must be an assignable bill. The acceptors should not be allowed to urge fraud: in their own defence: they should be bound by the fraud: they should be tied down to their transaction, as if it had been honest and *bona fide*. If the transaction had been honest; this would not have been a bill payable to bearer, but by assignment. He should urge no more arguments on this subject. He could not expect that any thing he had said could weigh with their Lordships, which contradicted the whole body of the law of England.

Lord Loughborough said, he had been repeatedly called upon to pronounce the best result of his understanding upon bills of this sort. After the very able opinions which he had heard,—and after balancing them in his mind with the utmost attention that he could bestow, the effect was, that he still remained of the same opinion which it was his duty originally to deliver in the Common Pleas, to wit, that this instrument ought to be considered as a bill payable to bearer*.

The Lord Chancellor, in the consideration of this case, had very properly put to the view of the Judges a question, antecedent to the discussion, on the merits. This question was,—Whether, by the matter found in the Special Verdict, the acts done by the parties to this bill imported an utterance of it, knowing it to have been forged?

The answer that had been received was,—That, from the matter found in the Special Verdict, it was impossible to say any forgery had been committed respecting the bill. One of

* Vide Case of Collis and Emmett in our Magazine for April last, vol. L. p. 192.

the Judges had hesitated whether the acceptance amounted to an utterance; but the general opinion was, that there was no forgery on the bill. The Special Verdict did not state that the writing the name of John White upon the bill was done with an intent to defraud any particular person.

It appeared to his Lordship, that the matter so found by the Special Verdict was enough to support the opinion of the Judges. He thought there was no fact found in the Special Verdict from which fraud could be collected; but he conceived there were circumstances which directly negatived that conclusion; the Jury, seeing the indorsement of the drawers, before the value of the bill was actually paid, thought it demonstration that no deception had been practised on the holders, but that it must have occurred to Minet and Fector, that White was not in fact the payee of the bill; for that, if he had, it must have come from him, and not from the drawers, to the holders; and that it was impossible to account for its coming back again to Livesey, Hargreave and Co. if it had come out of the hands of the payee, which it must have done, had he been a real person. It was completely indifferent whether White existed or not, —whether he was worth a sixpence or not,—whether he was to be found or not. Gibson and Johnson accepted it as the draft of Livesey, Hargreave, and Co. with their indorsement upon it, as the indorsement of a bill that had never been out of their custody. Finding this bill brought to them, with the name of Livesey, Hargreave, and Co. upon it, as well with the name of John White, they accepted the bill. Upon what ground, and under what circumstances did they accept it? Was it an acceptance to pay to the order of John White? They knew, at the time, the name of White was nothing. They knew it was a bill that had come immediately out of the hands of Livesey, Hargreave and Co. and therefore they accepted it, to pay to the person who for value held it from Livesey, Hargreave and Co. that was, to pay it to whoever was the bearer.

The distinction between bills payable to order, and to bearer, was this, that bills payable to order must be assigned by the real payee. Such bills could never get back to the hands of the drawer but by being dishonoured:—They passed by assignment.

A bill payable to bearer, any man, who picked it up in the street, might maintain an action upon it. The state of this bill when presented for acceptance negatived the idea that

that there was any such person as J. White. They knew the words, *John White, or order*, were negotiable only in that bill.

There was a convenience in trade for merchants to be able to raise money; and this was frequently done through the medium of Bills of Exchange. The bills were sent to market, and were negotiated by means of the brokers. The broker put a name upon them, and did not disclose his principal till he had found a person who would deal with him;—the principal was then discovered, who put his name upon the bill, and from the moment the buyer got that indorsement, he was perfectly indifferent.

It was found by the Special Verdict, that the bill in question was accepted by Gibson and Johnson after it was indorsed by the drawers.—From that instant, his Lordship denied that this was a bill payable any longer to the order of White, because the acceptors, at the time they put their acceptance to the bill, took White to be purely matter of form; and therefore he was of opinion, that in its proper and legal operation, and in the real and true state of the transaction between the parties, this was a bill which Gibson and Johnson undertook to pay to whoever should produce that bill to them with the indorsement of Livesey, Hargreave and Co. and to whoever had paid a valuable consideration to the drawers.

An objection which had been stated by the Chief Baron operated strongly upon his mind: but his Lordship thought he could answer it. It proceeded on a mistaken state of the question.—The Chief Baron conceived the question was, whether the Plaintiff had made out his title to recover on this bill, and that the Defendant was not obliged to move one step in the cause till the Plaintiff had produced evidence of an assignment made by White, by some circumstances that would amount to a proof against the person who disputed that fact. They must previously establish the fact, that an assignment had been made of that bill by John White, before they could call for payment.

His Lordship conceived, that the Plaintiffs had proved distinctly and clearly their title to the bill, by proving they had paid value for it to the person from whom they received it.

A few considerations would make this sufficiently clear to their Lordships.

The Defendants in Error had proved they paid value for the bill to Livesey, Hargreave and Co. who indorsed it;

an action therefore would lie against Livesey, Hargreave and Co. Whether the name of White, or order, could be proved or not, an action might be brought against them as indorsers. For a long series of time, Courts had held that an indorsee might maintain an action against an indorser; and it was upon this ground that an indorsement made a new bill. In the present bill, he could prove the drawers wrote the name of White with the privity of the acceptors.

Said his Lordship, Have I not made out my title? It was in vain to say that he had not made out a proper title. He therefore met the difficulty that was suggested; and the only question was, Whether he had made out such a title as would give him a right to recover?

He confessed, where the justice of the case stared him fully and fairly in the face, he did not find himself pleased when he felt himself knocked down by an objection. He conceived that substantial justice was of much more importance than the beauties of special pleading.

This was an engagement; on the part of the Plaintiffs in error, to pay to whoever should hold this bill under the indorsement of Livesey, Hargreave and Co.

His Lordship then put the question, whether this was not, in fact and in truth, an undertaking to the bearer. It was not an engagement to pay *nominatim* to Minet and Fector, but to any person who could justify himself under an indorsement from Livesey, Hargreave and Co. The true effect of this bill, in every form in which it could be put, was, that it was a bill payable to bearer.

It was never sent into the world as a bill payable to order;—for while it was in the hands of the drawers it was not; and, the moment it was sent into the world, it was a bill payable to bearer.

His Lordship observed, that as to the policy of the decision, of setting up a fictitious payee, if this method was useful to merchants, and was prohibited by this decision, their Lordships only told people, instead of a fictitious name, to substitute the name of the meanest cobbler in the street, or the lowest clerk in the house.

Their Lordships knew that the parties had all become bankrupts.

He should suppose the present holders could not recover in an action brought upon this bill.—What would be the state of these parties? He should suppose that another action might be brought. He thought an action for money

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**ARGUMENT in Support of the RIGHTS OF JURIES
in CASES OF LIBEL.**

The Great Question concerning Libels being expected shortly to undergo a Parliamentary Discussion on a Motion of the Hon. Charles James Fox, we take this Opportunity of giving the Publick a Correc^t Account of the Speech delivered by the *Hon. T. Erskine* in the Court of King's Bench, Nov. 15, 1784, upon an Application for a New Trial for a supposed Misdirection of the Judge, (Sir F. Buller), in the Case of the Dean of St. Asaph, at Shrewsbury.

I am now to have the honour to address myself to your Lordship, in support of the rule granted to me by the Court upon Monday last, which, as Mr. Bearcroft has truly said, and seemed to mark the observation with peculiar emphasis, is a rule for a new trial. Much of my argument, according to his notion, points another way; whether its direction be true, or its force adequate to the object, it is now my business to shew.

In rising to speak at this time, I feel all the advantage conferred by the reply over those whose arguments are to be answered; but I feel a disadvantage likewise which must suggest itself to every intelligent mind.

In following the objections of so many learned persons, offered in different arrangements upon a subject so complicated and comprehensive, there is much danger of being drawn from that method and order which can alone fasten conviction upon unwilling minds, or drive them from the shelter which ingenuity never fails to find in the labyrinth of a desultory discourse.

The sense of that danger, and my own inability to struggle against it, led me originally to deliver to the Court, certain written and maturely considered propositions, from the establishment of which I resolved not to depart, or to be removed, either in substance or in order, in any stage of the proceedings, and by which I must therefore this day unquestionably stand or fall.

Pursuing this system, I am vulnerable two ways, and in two ways only. Either it must be shewn that my propositions are not valid in law; or, admitting their validity, that the learned Judge's Charge to the Jury at Shrewsbury was not repugnant to them: there can be no other possible objections to my application for a new trial.

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Looking back upon the ancient constitution, and examining with painful research the original jurisdictions of the country, I am utterly at a loss to imagine from what sources these novel limitations of the rights of Juries are derived. Even the Bar is not yet trained to the discipline of maintaining them. My learned friend, Mr. Bearcroft, solemnly abjures them: he repeats to-day what he avowed at the trial, and is even jealous of the imputation of having meant less than he expressed; for, when speaking this morning of the right of the Jury to judge of the whole charge, your Lordship corrected his expression, by telling him he meant the power, and not the right; he caught instantly at your words, disavowed your explanation, and, with a consistency which does him honour, declared his adherence to his original admission in its full and obvious extent.

"I did not mean," said he, "merely to acknowledge that the Jury have the power; for their power nobody ever doubted; and, if a Judge was to tell them they had it not, they would only have to laugh at him, and convince him of his error, by finding a general verdict which must be recorded: I meant, therefore, to consider it as a right, as an important privilege, and of great value to the constitution."

Thus Mr. Bearcroft and I are perfectly agreed; I never contended for more than he has voluntarily conceded. I have now his express authority for repeating, in my own former words, that the Jury have not merely the power to acquit, upon a view of the whole charge, without controul or punishment, and without the possibility of their acquittal being annulled by any other authority; but that they have a constitutional legal right to do it; a right fit to be exercised; and intended by the wise founders of the government, to be a protection to the lives and liberties of Englishmen, against the encroachments and perversions of authority in the hands of fixed magistrates.

But this candid admission on the part of Mr. Bearcroft, though very honourable to himself, is of no importance to me, since, from what has already fallen from your Lordship, I am not to expect a ratification of it from the Court; it is therefore my duty to establish it. I feel all the importance of my subject, and nothing shall lead me to-day to go out of it. I claim all the attention of the Court, and the right to state every authority which applies in my judgement to the argument, without being supposed to introduce them for other purposes than my duty to my client, and the constitution of my country warrants and approves.

It is not very usual, in an English Court of Justice, to be driven back to the earliest history and original elements of the constitution, in order to establish the first principles which mark and distinguish English law: they are always assumed; and, like axioms in science, are made the foundations of reasoning without being proved. Of this sort our ancestors, for many centuries, must have conceived the right of an English Jury to decide upon every question which the forms of the law submitted to their final decision; since, though they have immemorially exercised that supreme jurisdiction, we find no trace in any of the ancient books of its ever being brought into question.

It is but as yesterday, when compared with the age of the law itself, that Judges, unwarranted by any former judgments of their predecessors, without any new commission from the Crown, or enlargement of judicial authority from the Legislature, have sought to fasten a limitation upon the rights and privileges of Jurors, totally unknown in ancient times, and palpably destructive of the very end and object of their institution.

No fact, my Lord, is of more easy demonstration; for the history and laws of a free country lie open even to vulgar inspection.

During the whole Saxon æra, and even long after the establishment of the Norman government, the whole administration of justice, criminal and civil, was in the hands of the people themselves, without the controul or intervention of any judicial authority, delegated to fixed magistrates by the Crown. The tenants of every manor administered civil justice to one another in the Court-Baron of their Lord; and their crimes were judged of in the teet, every suitor of the manor giving his voice as a Juror, and the Steward being only the Register, and not the Judge.

On appeals from these domestic jurisdictions to the County-Court, and to the torn of the Sheriff, or in suits and prosecutions originally commenced in either of them, the Sheriff's authority extended no further than to summon the Jurors, to compel their attendance, ministerially to regulate their proceedings, and to enforce their decisions; and even where he was specially empowered by the King's writ of Justices to proceed in causes of superior value, no judicial authority was thereby conferred upon himself, but only a more enlarged jurisdiction on the Jurors who were to try the cause mentioned in the writ.

It is true that the Sheriff cannot now intermeddle in pleas of the Crown; but with this excep

no restrictions on Juries, these jurisdictions remain untouched at this day; intricacies of property have introduced other forms of proceeding, but the constitution is the same.

This popular judicature was not confined to particular districts, or to inferior suits and misdemeanors, but pervaded the whole legal constitution; for, when the Conqueror, to increase the influence of his Crown, erected that great superintending Court of Justice in his own Palace, to receive appeals criminal and civil from every Court in the kingdom, and placed at the head of it the *Capitalis iusticiarius totius Angliæ*, of whose original authority the Chief Justice of this Court is but a partial and feeble emanation, even that great Magistrate was in the *aula regis* merely ministerial: every one of the King's tenants who owed him service in right of a barony, had a seat and a voice in that high tribunal; and the office of Justiciar was but to record and to enforce their judgments.

In the reign of King Edward the First, when this great office was abolished, and the present Courts at Westminster established by a distribution of its powers; the Barons preserved that supreme superintending jurisdiction which never belonged to the Justiciar, but to themselves only as the Judges in the King's Court: a jurisdiction which, when removed from being territorial and feudal became personal and honorary, was assumed and exercised by the Peers of England, who, without any delegation of judicial authority from the Crown, form to this day the supreme and final Court of English law, judging in the last resort for the whole kingdom, and sitting upon the lives of the peerage, in their ancient and genuine character, as the *pares* of one another.

When the Courts at Westminster were established in their present forms, and when the civilization and commerce of the nation had introduced more intricate questions of justice, the judicial authority in civil cases could not but enlarge its bounds; the rules of property in a cultivated state of society became by degrees beyond the compass of the unlettered multitude, and in certain well-known restrictions undoubtedly fell to the Judges; yet more perhaps from necessity than by consent, as all judicial proceedings were actually held in the Norman language, to which the people were strangers.

Of these changes in judicature, immemorial custom, and the acquiescence of the Legislature, is the evidence which establish the jurisdiction of the Courts on the true principles

of English law, and measure the extent of it by their ancient practice.

But no such evidence is to be found of any the least relinquishment or abridgement of popular judicature in cases of crimes; on the contrary, every page of our history is filled with the struggles of our ancestors for its preservation.

The law of property changes with new objects, and becomes intricate as it extends its dominion; but crimes must ever be of the same easy investigation; they consist wholly in intention; and the more they are multiplied by the policy of those who govern, the more absolutely the publick freedom depends upon the people's preserving the entire administration of criminal justice to themselves.

In a question of property between two private individuals, the Crown can have no possible interest in preferring the one to the other: but it may have an interest in crossing both of them together in defiance of every principle of Humanity and Justice, if they should put themselves forward in a contention for public liberty against a government seeking to emancipate itself from the dominion of the laws. No man in the least acquainted with the history of nations, or of his own country, can refuse to acknowledge, that if the administration of criminal justice were left in the hands of the Crown, or its deputies, no greater freedom could possibly exist than Government might choose to tolerate from the convenience or policy of the day.

My Lord, this important truth is no discovery or assertion of mine, but is to be found in every book of the law: whether we go up to the most ancient authorities, or appeal to the writings of men of our own times, we meet with it alike in the most emphatical language. Mr. Justice Blackstone, by no means biassed towards democratical government, having, in the third volume of his *Commentaries*, explained the excellence of the Trial by Jury in civil cases, expresses himself thus: Vol. IV. p. 349. — "It holds much stronger in criminal cases; since in times of difficulty and danger, more is to be apprehended from the violence and partiality of Judges appointed by the Crown, in suits between the King and the subject, than in disputes between one individual and another, to settle the boundaries of private property. Our law has, therefore, wisely placed this strong and two-fold barrier of a presentment and trial by Jury, between the liberties of the people and the prerogative of the Crown: without this barrier, Justices of Oyer and Terminer named by the Crown, might as in France or

in Turkey, imprisonment, dispatch, or exile, any man that was obnoxious to government, by an instant declaration that such was their will and pleasure. So that the liberties of England cannot but subsist so long as this palladium remains sacred and inviolate, not only from all open attacks, which none will be so hardy as to make, but also from all secret machinations, which may sap and undermine it."

But this remark, though it derives new force in being adopted by so great an authority, was no more original to Mr. Justice Blackstone than mine, for the same express reason: for the institution and authority of Juries is to be found in Bracton, who wrote above five hundred years before him. "The *curia* and the *pari*," says he, "were necessarily the judges in all cases of life, limb, crime and dismemberment of the heir *in capite*. The King could not decide, for then he would have been both prosecutor and Judge; neither could his Justices, for they represent him."

Notwithstanding all this, the learned Judge was pleased to say at the trial, that there was no difference between civil and criminal cases. I say, on the contrary, independent of these authorities, that there is not, even to vulgar observation, the remotest similitude between them.

There are four capital distinctions between prosecutions for crimes, and civil actions, every one of which deserves consideration.

First, In the jurisdiction necessary to found the charge.

Secondly, In the manner of the Defendant's pleading to it.

Thirdly, In the authority of the verdict which discharges him.

Fourthly, In the independence and security of the Jury from all consequences in giving it.

As to the first, it is unnecessary to remind your Lordships, that, in a civil case, the party who conceives himself aggrieved, states his complaint to the Court, avails himself at his own pleasure of its process, compels an answer from the Defendant by its authority, or taking the charge *pro confesso* against him on his default, is intitled to final judgment and execution for his debt, without any interposition of a Jury. But in criminal cases it is otherwise; the Court has no cognizance of them, without leave from the people forming a grand inquest. If a man were to commit a capital offence in the face of all the Judges of England: their united authority could not put him upon his trial: they

they could file no complaint against him, even upon the records of the supreme criminal court; but could only commit him for safe custody, which is equally competent to every common Justice of the Peace: the Grand Jury alone could arraign him, and in their discretion might likewise finally discharge him, by throwing out the Bill, with the names of all your Lordships as witnesses on the back of it.

If it shall be said, that this exclusive power of the Grand Jury does not extend to lesser misdemeanors, which may be prosecuted by information; I answer, that for that very reason it becomes doubly necessary to preserve the power of the other Jury which is left.

But, in the rules of pleading, there is no distinction between capital and lesser offences; and I venture to assert, that the Defendant's plea of not guilty, which universally prevails as the legal answer to every information or indictment, as opposed to special pleas to the Court in civil actions, and the necessity imposed upon the Crown to join the general issue, is absolutely decisive of the present question.

Every lawyer must admit, that the rules of pleading were originally established to mark and to preserve the distinct jurisdictions of the Court and the Jury, by a separation of the law from the fact wherever they were intended to be separated. A person charged with owing a debt, or having committed a trespass, &c. &c. if he could not deny the facts on which the actions were founded, was obliged to submit his justification for matter of law by a special plea to the Court upon the record; to which plea the Plaintiff might demur, and submit the legal merits to the Judges. By this arrangement, no power was ever given to the Jury, by an issue joined before them, but when a right of decision, is comprehensive as the issue, went along with it: for, if a defendant in such civil actions pleaded the general issue instead of a special plea, aiming at a general deliverance from the charge, by shewing his justification to the Jury at the Trial, the Court protected its own jurisdiction, by refusing all evidence of the facts on which such justification was founded.

The extension of the general issue beyond its ancient limits, and in deviation from its true principle, has introduced some confusion into this simple and harmonious system; but the law is substantially the same.

No man, at this day, in any of those actions where the ancient forms of our jurisprudence are still wisely preserved,

can possibly get at the opinion of a Jury upon any question not intended by the constitution for their decision. In actions of debt, detinue, breach of covenant, trespass, or replevin, the defendant can only submit the mere fact to the Jury; the law must be pleaded to the Court: if, dreading the opinion of the Judges, he conceals his justification under the cover of a general plea in hopes of a more favourable construction of his defence at the trial, its very existence can never come within the knowledge of the Jurors; every legal defence must arise out of facts; and the authority of the Judge is interposed to prevent their appearing before a tribunal which, in such cases, has no competent jurisdiction over them.

By imposing this necessity of pleading every legal justification to the Court, and by this exclusion of all evidence on the trial beyond the negation of the fact, the Courts indisputably intended to establish, and did in fact effectually secure, the judicial authority over legal questions from all encroachment or violation; and it is impossible to find a reason in law, or in common-sense, why the same boundaries between the fact and the law should not have been at the same time extended to criminal cases by the same rules of pleading, if the jurisdiction of the Jury had been designed to be limited to the fact as in civil actions.

But no such boundary was ever made or attempted; on the contrary, every person charged with any crime by an indictment or information, has been in all times from the Norman Conquest to this hour not only permitted, but even bound to throw himself upon his country for deliverance, by the general plea of not guilty; and may submit his whole defence to the Jury, whether it be a negation of the fact, or a justification of it in law: and the Judge has no authority, as in a civil case, to refuse such evidence at the trial, as out of the issue, and as *coram non judice*, an authority which in common sense he certainly would have, if the Jury had no higher jurisdiction in the one case than in the other. The general plea thus sanctioned by immemorial custom, so blends the law and the fact together, as to be inseparable but by the voluntary act of the Jury in finding a special verdict: the general investigation of the whole charge is therefore before them; and although the defendant admits the fact laid in the information or indictment, he, nevertheless, under his general plea, gives evidence of others which are collateral, referring them to the judgment of the Jury, as a legal excuse or justification, and receives

receives from their verdict a complete, general, and conclusive deliverance.

Mr. Justice Blackstone in the fourth volume of his *Commentaries*, p. 339, says, "The traitorous or felonious intent are the points and very gift of the indictment, and must be answered directly by the general negative, not guilty; and the Jury will take notice of any defensive matter, and give their verdict accordingly, as effectually as if it were specially pleaded."

This, therefore, says Sir Matthew Hale, in his *Pleas of the Crown*, p. 258, is, upon all accounts, the most advantageous plea for the defendant: "It would be a most unhappy case for the Judge himself if the Prisoner's fate depended upon his directions; unhappy also for the prisoner: for if the Judges opinion must rule the verdict, the Trial by Jury would be useless."

My Lord, the conclusive operation of the verdict when given, and the security of the Jury from all consequences in giving it, renders the contrast between criminal and civil cases striking and complete. No new trial can be granted as in a civil action: your Lordships, however you may disapprove of the acquittal, have no authority to award one; for there is no precedent of any such upon record, and the discretion of the Court is circumscribed by the law.

Neither can the Jurors be attainted by the Crown. In *Bushe's case*, *Vaughan's Reports*, p. 146, that learned and excellent Judge expressed himself thus: "There is no case in all the law of an attainr for the King, nor any opinion but that of *Thyrning's*, 10th of Henry IVth, title *Attainr*, 60 and 64, for which there is no warrant in law, though there be other specious authority against it, touched by none that have argued this case."

Lord Mansfield. To be sure it is so.

Mr. Erskine. Since that is clear, my Lord, I shall not trouble the Court farther upon it: indeed I have not been able to find any one authority for such an attainr but a *dictum* in *Fitzherbert's Natura Brevium*, p. 107; and on the other hand, the doctrine of *Bushe's case* is expressly agreed to in very modern times, vide *Lord Raymond's Reports*, 11th volume, p. 469.

If then your Lordships reflect but for a moment upon this comparative view of criminal and civil cases which I have laid before you, how can it be seriously contended, not merely that there is no difference, but that there is any the remotest similarity between them? In the one case, the

power of accusation begins from the Court; in the other, from the people only, forming a Grand Jury. In the one the Defendant must plead a special justification, the merits of which can only be decided by the Judges; in the other, he may throw himself for general deliverance upon his country. In the first, the Court may award a new trial, if the verdict for the Defendant be contrary to the evidence or the law; in the last, it is conclusive and unalterable; and, to crown the whole, the King never had that process of attainder which belonged to the meanest of his subjects.

When these things are attentively considered, I might ask those who are still disposed to deny the right of the Jury to investigate the whole charge, whether such a solecism can be conceived to exist in any human government, much less in the most refined and exalted in the world, as that a power of supreme judicature should be conferred at random by the blind forms of the law where no right was intended to pass with it, and which was upon no occasion and under no circumstance to be exercised? which, though exerted notwithstanding in every age and in a thousand instances, to the confusion and discomfiture of fixed magistracy, should never be checked by authority, but should continue on from century to century, the revered guardian of liberty and of life, arresting the arm of the most headstrong government in the worst of times, without any power in the Crown or its Judges to touch without its consent the meanest wretch in the kingdom, or even to ask the reason and principle of the verdict which acquits him. That such a system should prevail in a country like England, without either the original institution or the acquiescing sanction of the Legislature is impossible. Believe me, my Lord, no talents can reconcile, no authority can sanction such an absurdity; the common sense of the world revolts at it.

Having established this important right in the Jury beyond all possibility of cavil or controversy, I will now shew your Lordship that its existence is not merely consistent with theory, but is illustrated and confirmed by the universal practice of all Judges; not even excepting Mr. Justice Forster himself, whose writings have been cited in support of the contrary opinion. How a man expresses his abstract ideas is but of little importance when an appeal can be made to his plain directions to others, and to his own particular conduct: but even none of his expressions when properly considered and understood, militate against my position.

In his justly celebrated book on the criminal law, p. 256, he expresses himself thus: "The construction which the law putteth upon fact stated and agreed or found by a Jury is in all cases undoubtedly the proper province of the Court."

Now if the adversary is disposed to stop here, though the author never intended he should, as is evident from the rest of the sentence, yet I am willing to stop with him, and to take it as a substantive proposition; for the slightest attention must discover that it is not repugnant to any thing which I have said. Facts stated and agreed, or facts found by a Jury, which amounts to the same thing, constitute a special verdict; and who ever supposed that the law upon a special verdict was not the province of the Court? Who ever denied, that where upon a general issue the parties chuse to agree upon facts and to state them; or the Jury chuse voluntarily to find them without drawing the legal conclusion themselves, that in such instances the Court is to draw it? That Forster meant nothing more than that the Court was to judge of the law when the Jury thus voluntarily prays its assistance by special verdict, is evident from his words which follow, for he immediately goes on to say; in cases of doubt and *real* difficulty, it is therefore commonly recommended to the Jury to state facts and circumstances in a special verdict: but neither here, nor in any other part of his works, is it said or insinuated that they are bound to do so but at their own free discretion: indeed the very term recommended, admits the contrary, and requires no commentary. I am sure I shall never dispute the wisdom or expediency of such a recommendation in those cases of doubt, because the more I am contending for the existence of such an important right, the less it would become me to be the advocate of rashness and precipitation in the exercise of it.

It is no denial of jurisdiction to tell the greatest magistrate upon earth to take good counsel in cases of real doubt and difficulty. Judges upon trials, whose authority to state the law is indisputable, often refer it to be more solemnly argued before the Court; and this Court itself often holds a meeting of the Twelve Judges before it decides on a point upon its own records, of which the others have confessedly no cognizance till it comes before them by the writ of error of one of the parties.—These instances are monuments of wisdom, integrity, and discretion, but they do not bear in the remotest degree upon jurisdiction: the sphere of jurisdiction

is measured by what may or may not be decided by any given tribunal with legal effect, not by the rectitude or error of the decision. If the Jury according to these authorities may determine the whole matter by their verdict, and if the verdict when given is not only final and unalterable, but must be enforced by the authority of the Judges, and executed, if resisted by the whole power of the state; upon what principle of government or reason can it be argued not to be law? That the Jury are in this exact predicament is confessed by Forster; for he concludes with saying, that when the law is clear, the Jury, under the direction of the Court in point of law, may, and if they are well advised will, always find a general verdict conformably to such directions.

This is likewise consistent with my position: if the law be clear, we may presume that the judge states it clearly to the Jury; and if he does, undoubtedly the Jury, if they are well advised, will find according to such directions; for they have not a capricious discretion to make law at their pleasure, but are bound in conscience, as well as Judges are, to find it truly; and, generally speaking, the learning of the Judge who presides at the trial, affords them a safe support and direction.

The same practice of Judges in stating the law to the Jury, as applied to the particular case before them, appears likewise in the case of the King against Oneby, 2d Lord Raymond, p. 1494. "On the trial the judge directs the Jury thus: If you believe such and such witnesses who have sworn to such and such facts, the killing of the deceased appears to be with malice prepense; but if you do not believe them, then you ought to find him guilty of manslaughter; and the Jury may, if they think proper, give a general verdict of murder or manslaughter; but if they decline giving a general verdict, and will find the facts specially, the Court is then to form their judgment from the facts found, whether the Defendant be guilty or not guilty, *i. e.* whether the act was done with malice and deliberation or not."

Surely language can express nothing more plainly or unequivocally, than that where the general issue is pleaded to an indictment, the law and the fact are both before the Jury; and that the former can never be separated from the latter, for the judgment of the Court, unless by their own spontaneous act: for the words are, "If they decline giving a general verdict, and will find the facts specially, the Court is *then* to form their judgment from the facts found."

So that after a general issue joined, the authority of the Court only commences when the Jury chooses to decline the decision of the law by a general verdict; the right of declining which legal determination, is by-the-by a privilege conferred on them by the statute of Westminster, 2d; and by no means a restriction of their powers.

But another very important view of the subject remains behind: for supposing I had failed in establishing that contrast between criminal and civil cases, which is now too clear not only to require, but even to justify another observation, the argument would lose nothing by the failure; the similarity between criminal and civil cases derives all its application to the argument from the learned Judge's supposition, that the jurisdiction of the Jury over the law was never contended for in the latter, and consequently on a principle of equality could not be supported in the former; whereas, I do contend for it, and can incontestibly establish it in both. This application of the argument is plain from the words of the charge: "If the Jury could find the law, it would undoubtedly hold in civil cases as well as criminal: but was it ever supposed that a Jury was competent to say the operation of a fine, or a recovery, or a warranty, which are mere questions of law?"

To this question I answer, that the competency of the Jury in such cases is contended for to the full extent of my principle, both by Lyttleton and by Coke: they cannot indeed decide upon them, *de plano*, which, as Vaughan truly says, is unintelligible, because an unmixed question of law can by no possibility come before them for decision: but whenever (which very often happens) the operation of a fine, a recovery, a warranty, or any other record or conveyance known to the law of England comes forward, mixed with the fact on the general issue, the Jury have then most unquestionably a right to determine it; and what is more, no other authority possibly can; because when the general issue is permitted by law, these questions cannot appear on the record for the judgment of the Court; and although it can grant a new trial, yet the same question must ultimately be determined by another Jury. This is not only self-evident to every lawyer, but, as I said, is expressly laid down by Lyttleton in the 368th section. "Also in such case where the inquest may give their verdict at large, if they will take upon them the knowledge of the law upon the matter, they may give their verdict generally as it is put in their charge: as in the case aforesaid they may well say, that the lessor did not disseise the lessee if they will." *Coke*

In his commentary on this section, confirms Lyttleton, saying, That in doubtful cases they should find specially for fear of an attainr: and it is plain that the statute of Westminster the 2d, was made either to give or to confirm the right of the Jury, to find the matter specially if they would, leaving their jurisdiction over the law as it stood by the common law. The words of the statute of Westminster 2d, chapter 30th. are, "*Ordinatum est quod iudicarii ad assisas capiendas assignati, non compellant juratores dicere precise si sit disseina vel non; dummodo dicere voluerint veritatem facti et potere auxilium curie.*"

From these words it should appear, that the jurisdiction of the Jury over the law when it came before them on the general issue, was so vested in them by the constitution, that the exercise of it in all cases had been considered to be compulsory upon them, and that this act was a legislative relief from that compulsion in the case of an assize of disseizin: it is equally plain from the remaining words of the Act, that their jurisdiction remained as before; "*sed si sponte velent dicere quod disseina est vel non, admittatur eorum verdictum sub suo periculo.*"

But the most material observation upon this statute as applicable to the present subject is, That the terror of the attainr from which it was passed to relieve them, having (as has been shewn) no existence in cases of crime, the act only extended to relieve the Jury at their discretion from finding the law in civil actions; and consequently it is only from custom, and not from positive law, that they are not even compellible to give a general verdict involving a judgment of law on every criminal trial.

These principles and authorities certainly establish that it is the duty of the Judge, on every trial, where the general issue is pleaded; to give to the Jury his opinion on the law as applied to the case before them; and that they must find a general verdict comprehending a judgment of law, unless they choose to refer it specially to the Court.

But we are here, in a case where it is contended, that the duty of the Judge is the direct contrary of this: that he is to give no opinion at all to the Jury upon the law as applied to the case before them; that they likewise are to refrain from all consideration of it, and yet that the very same general verdict comprehending both fact and law, is to be given by them as if the whole legal matter had been summed up by the one and found by the other.

I confess I have no organs to comprehend the principle on which such a practice proceeds. I contended for nothing more

more at the trial than the very practice recommended by Forster and Lord Raymond: I addressed myself to the Jury upon the law with all possible respect and deference, and indeed with very marked personal attention to the learned Judge: so far from urging the Jury dogmatically to think for themselves without his constitutional assistance, I called for his opinion on the question of libel, saying, That if he should tell them distinctly the paper indicted was libellous, though I should not admit that they were bound at all events to give effect to it if they felt it to be innocent; yet I was ready to agree that they ought not to go against the charge without great consideration: but that if he should shut himself up in silence, giving no opinion at all upon the criminality of the paper from which alone any guilt could be fastened on the publisher, and should narrow their consideration to the publication, I entered my protest against their finding a verdict affixing the epithet of *guilty* to the mere fact of publishing a paper, the guilt of which they had not investigated.

If, after this address to the Jury, the learned Judge had told them, that in his opinion the paper was a libel, but still leaving it to their judgments, and leaving likewise the Defendant's evidence to their consideration, had further told them, that he thought it did not exculpate the publication; and if, in consequence of such directions, the Jury had found a verdict for the Crown; I should never have made my present motion for a new trial: because I should have considered such a verdict of guilty as founded upon the opinion of the Jury on the whole matter as left to their consideration, and must have sought my remedy by arrest of judgment on the record.

But the learned Judge took a direct contrary course: he gave no opinion at all on the guilt or innocence of the paper; he took no notice of the Defendant's evidence of intention; told the Jury, in the most explicit terms, that neither the one nor the other were within their jurisdiction; and, upon the mere fact of publication, directed a general verdict comprehending the epithet of guilty, after having expressly withdrawn from the Jury every consideration of the merits of the paper published, or the intention of the publisher, from which it is admitted on all hands the guilt of publication could alone have any existence.

My motion is therefore founded upon this obvious and simple principle, that the defendant has had in fact no trial; having been found guilty without any investigation of his guilt, and without any power left to the Jury to determine

nizance of his innocence. I undertake to shew, that the Jury could not possibly conceive or believe from the Judge's Charge, that they had any jurisdiction to acquit him, however they might have been impressed even with the merit of the publication, or convinced of his meritorious intention in publishing it: nay, what is worse, while the learned Judge totally deprived them of their whole jurisdiction over the question of libel and the Defendant's seditious intention, he at the same time directed a general verdict of guilty, which comprehended a judgment upon both.

When I put this construction on the learned Judge's direction, I found myself wholly on the language in which it was communicated; and it will be no answer to such construction, that no such restraint was meant to be conveyed by it. If the learned Judge's intentions were even the direct contrary of his expressions, yet if in consequence of that which was expressed though not intended, the Jury were abridged of a jurisdiction which belonged to them by law, and in the exercise of which the defendant had an interest, he is equally a sufferer, and the verdict given under such a misconception of authority is equally void: my application ought therefore to stand or fall by the charge itself, upon which I disclaim all disingenuous cavilling. I am certainly bound to shew, that from the general result of it, fairly and liberally interpreted, the Jury could not conceive that they had any right to extend their consideration beyond the bare fact of publication, so as to acquit the Defendant by a judgment founded on the legality of the dialogue, or the honesty of the intention in publishing it.

In order to understand the learned Judges direction, it must be recollected that it was addressed to them in answer to me, who had contended for nothing more than that these two considerations ought to rule the verdict; and it will be seen, that the charge, on the contrary, not only excluded both of them by general inference, but by expressions, arguments, and illustrations the most studiously selected to convey that exclusion, and to render it binding on the consciences of the Jury.

After telling them in the very beginning of his charge, that the single question for their decision was, Whether the Defendant had published the pamphlet? He declared to them, that it was not even *allowed* to him, as the Judge trying the cause, to say whether it was or was not a libel: for that if he should say it was no libel, and they, following his direction, should acquit the Defendant; they would hereby deprive the prosecutor of his writ of error upon

the record, which was one of his dearest birthrights. The law, he said, was equal between the Prosecutor and the Defendant; that a verdict of acquittal would close the matter for ever, depriving him of his appeal; and that whatever therefore was upon the record was not for their decision, but might be carried at the pleasure of either party to the House of Lords.

Surely language could not convey a limitation upon the right of the Jury over the question of libel, or the intention of the publisher, more positive or more universal. It was positive, inasmuch as it held out to them that such a jurisdiction could not be entertained without injustice; and it was universal, because the principle had no special application to the particular circumstances of that trial; but subjected every Defendant, upon every prosecution for a libel, to an inevitable conviction on the mere proof of publishing *any thing*, though both Judge and Jury might be convinced that the thing published was innocent and even meritorious.

My Lord, I make this commentary without the hazard of contradiction from any man whose reason is not disordered. For if the prosecutor in every case has a birthright by law to have the question of libel left open upon the record, which it can only be by a verdict of conviction on the single fact of publishing; no legal right can at the same time exist in the Jury to shut out that question by a verdict of acquittal founded upon the merits of the publication, or the innocent mind of the publisher.

Rights that are repugnant and contradictory cannot be co-existent. The Jury can never have a constitutional right to do an act beneficial to the Defendant, which when done deprives the prosecutor of a right which the same constitution has vested in him. No right can belong to one person, the exercise of which in every instance must necessarily work a wrong to another. If the prosecutor of a libel has in every instance the privilege to try the merits of his prosecution before the Judges, the Jury can have no right in any instance to preclude his appeal to them by a general verdict for the Defendant.

The Jury therefore from this part of the charge must necessarily have felt themselves absolutely limited (I might say even in their powers) to the fact of publication; because the highest restraint upon good men is, to convince them that they cannot break loose from it without injustice: and the power of a good citizen is never more effectually destroyed than when he is made to believe that

it will be a breach of his duty to the public, and a violation of the laws of his country.

But since equal justice between the Prosecutor and the Defendant is the pretence for this abridgment of jurisdiction, let us examine a little how it is effected by it.

Do the Prosecutor and the Defendant really stand upon an equal footing by this mode of proceeding? With what decency this can be alledged, I leave those to answer who know that it is only by the indulgence of Mr. Bearcroft, Counsel for the Prosecution, that my Reverend Client is not at this moment in prison *, while we are discussing this notable equality.

Besides, my Lord, the judgment of this Court, though not final in the constitution, and therefore not binding on the Prosecutor, is absolutely conclusive on the Defendant. If your Lordships pronounce the record to contain no libel, and arrest the judgment on the verdict, the prosecutor may carry it to the House of Lords; and pending his writ of error remains untouched by your Lordship's decision. But, if judgment be against the Defendant, it is only at the discretion of the Crown (as it is said) and not of right, that he can prosecute any writ of error at all; and even if he finds no obstruction in that quarter, it is but at the best an appeal for the benefit of public liberty, from which he himself can have no personal benefit; for the writ of error being no supersedeas, the punishment is inflicted on him in the mean time.

In the case of Mr. Horne, this Court imprisoned him for publishing a libel upon its own judgment, pending his appeal from its justice; and he had suffered the utmost rigour which the law imposed upon him as a criminal, at the time that the House of Lords, with the assistance of the Twelve Judges of England, were gravely assembled to determine whether he had been guilty of any crime. I do not mention this case as hard or rigorous on Mr. Horne, as an individual: it is the general course of practice, but surely that practice ought to put an end to this argument of equality between prosecutor and prisoner.

It is adding insult to injury, to tell an innocent man who is in a dungeon, pending his writ of error, and of whose innocence both Judge and Jury were convinced at the

* Lord Mansfield ordered the Dean to be committed on the motion for the new trial, and said, he had no discretion to suffer him to be at large, without consent, after his appearance in Court, on conviction. Upon which Mr. Bearcroft gave his consent that the Dean should remain at large upon bail.

trial, that he is in equal scales with his prosecutor, who is at large, because he has an opportunity of deciding, after the expiration of his punishment, that the prosecution had been unfounded, and his sufferings unjust.

By parity of reasoning, a prisoner in a capital case is to be hanged in the mean time for the benefit of equal justice; leaving his executors to fight the battle out with his prosecutor upon the record, through every Court in the kingdom: by which at last his attainder must be reversed, and the blood of his posterity remain uncorrupted. What justice can be more impartial or equal?

So much for this right of the prosecutor of a libel to *compel* a Jury, in every case, generally to convict a Defendant on the fact of publication, or to find a special verdict: a right unheard of before since the birth of the constitution; not even founded upon any equality in fact, even if such a shocking parity could exist in law, and not even contended to exist in any other case where private men become the prosecutors of crimes for the ends of public justice.

It can have, generally speaking, no existence in any prosecution for felony; because the general description of the crime in such indictments, for the most part, shuts out the legal question, in the particular instance, from appearing on the record: and, for the same reason, it can have no place even in appeals of death, &c. the only cases where prosecutors appear as the revengers of their own private wrongs, and not as the representatives of the Crown.

The learned Judge proceeded next to establish the same universal limitation upon the power of the Jury, from the history of different trials, and the practice of former Judges who presided at them. And while I am complaining of what I conceive to be injustice, I take care not to be unjust myself. I certainly do not, nor ever did, consider the learned Judge's misdirection in his Charge to be peculiar to himself: it was only the resistance of the Defendants evidence, and what passed after the Jury returned into Court with the verdict, that I ever considered to be a departure from all precedents: the rest had undoubtedly the sanction of several modern cases; and I wish, therefore, to be distinctly understood, that I partly found my motion for a new trial in opposition to these decisions. It is my duty to speak with deference of all the judgments of this Court; and I feel an additional respect for some of those I am about to combat, because they are your Lordships: but comparing them with the judgments of your predecessors for ages, which is

the highest evidence of English law, I must be forgiven if I presume to question their authority.

My Lord, it is necessary that I should take notice of some of them as they occur in the learned Judge's Charge; for although he is not responsible for the rectitude of those precedents which he only cited in support of it, yet the Defendant is unquestionably entitled to a new trial, if their principles are not ratified by the Court: for whenever the learned Judge cited precedents to warrant the limitation on the province of the Jury imposed by his own authority, it was such an adoption of the doctrines they contained as made them a rule to the Jury in their decision.

First then, the learned Judge, to overturn my argument with the Jury for their jurisdiction over the whole Charge, opposed your Lordship's established practice for eight-and-twenty years; and the weight of this great authority was increased by the general manner in which it was stated; for I find no expressions of your Lordship's in any of the reported cases which go the length contended for. I find the practice, indeed, fully warranted by them; but I do not meet with the principle which can alone vindicate that practice, fairly and distinctly avowed. The learned Judge, therefore, referred to the Charge of Chief Justice Raymond, in the Case of the King and Franklin, in which the universal limitation contended for is indeed laid down, not only in the most unequivocal expressions, but the ancient jurisdiction of Juries, resting upon all the authorities I have cited, treated as a ridiculous notion which had been just taken up before the year 1731, and which no man living had ever dreamt of before. The learned Judge observed, that Lord Raymond stated to the Jury, on Franklin's Trial, that there were three questions; the first was, the fact of publishing the Craftsman. Secondly, whether the averments in the information were true: but that the third, *viz.* whether it was a libel, was merely a question of law, with which the Jury *had nothing to do*, as had been then of late thought by some people who ought to have known better.

This direction of Lord Raymond's was fully ratified and adopted in all its extent, and given to the Jury, on the present trial, with several others of the same import, as an unerring guide for their conduct; and surely human ingenuity could not frame a more abstract and universal limitation upon their right to acquit the Defendant by a general verdict; for Lord Raymond's expressions amount to an absolute denial of the right of the Jury to find the Defendant not guilty, if the publication and innuendoes are proved. " Libel

or no libel, is a question of law with which you, the Jury, *have nothing to do*." How then can they have any right to give a general verdict consistently with this declaration? Can any man in his senses collect that he has a right to decide on that with which he has nothing to do?

But it is needless to comment on these expressions, for the Jury were likewise told by the learned Judge himself, that if they believed the fact of publication, they were *bound* to find the Defendant guilty; and it will hardly be contended, that a man has a right to refrain from doing that which he is bound to do.

Mr. Cowper, as counsel for the prosecution, took upon him to explain what was meant by this expression; and I seek for no other construction: "The learned Judge (said he) did not mean to deny the right of the Jury, but only to convey, that there was a religious and moral obligation upon them to refrain from the exercise of it."

Now, if the principle which imposed that obligation had been alleged to be special, applying only to the particular case of the Dean of St. Asaph, and consequently consistent with the right of the Jury, to a more enlarged jurisdiction in other instances; telling the Jury that they were bound to convict on proof of publication, might be plausibly construed into a recommendation to refrain from the exercise of their right in that case, and not to a general denial of its existence: but the moment it is recollected, that the principle which bound them was not particular to the instance, but abstract, and universal, binding alike in every prosecution for a libel, it requires no logic to pronounce the expression to be an absolute, unequivocal, and universal denial of the right: common sense tells every man, that to speak of a person's right to do a thing which yet in every possible instance where it might be exerted, he is *religiously* and morally bound not to exert, is not even sophistry, but downright vulgar nonsense.

But, my Lord, the Jury were not only limited by these modern precedents, which certainly have an existence; but were in my mind limited with still greater effect by the learned judges declaration, that some of those ancient authorities on which I had principally relied for the establishment of their jurisdiction, had not merely been overruled, but were altogether inapplicable. I particularly observed how much ground I lost with the Jury, when they were told from the Bench, that even in *Bushel's case*, on which I had so greatly depended, the very reverse of my doctrine had been expressly established: the C

said unanimously in that case, according to the learned Judge's state of it, that if the Jury be asked what the law is, they cannot say, and having likewise ratified in express terms the maxim, *ad questionem legis non respondent juratores*.

My Lord, this declaration from the Bench, which I confess not a little staggered and surprized me, rendered it my duty to look again into Vaughan, where Bushel's case is reported; I have performed that duty, and now take upon me positively to say, that the words of Lord Chief Justice Vaughan, which the learned Judge considered as a judgment of the Court, denying the jurisdiction of the Jury over the law, "where a general issue is joined before them," were on the contrary made use of by that learned and excellent person to expose the fallacy of such a misapplication of the maxim alluded to by the Counsel against Bushel; declaring, that it had no reference to any case where the law and the fact were incorporated by the plea of not guilty, and confirming the right of the Jury to find the law upon every such issue, in terms the most emphatical and expressive. This is manifest from the whole report.

Bushel, one of the Jurors on the trial of Penn and Mead, had been committed by the Court for finding the Defendant not guilty, against the direction of the Court in matter of law; and being brought before the Court of Common Pleas by Habeas Corpus, this cause of commitment appeared upon the face of the return to the writ. It was contended by the Counsel against Bushel upon the authority of this maxim, that the commitment was legal, since it appeared by the return, that Bushel had taken upon him to find the law against the direction of the Judge, and had been therefore legally imprisoned for that contempt. It was upon that occasion that Chief Justice Vaughan, with the concurrence of the whole Court, repeated the maxim, *ad questionem legis non respondent juratores*, as cited by the Counsel for the Crown, but denied the application of it to impose any restraint upon Jurors trying any crime upon the general issue. His language is too remarkable to be forgotten, and too plain to be misunderstood. Taking the words of the return to the Habeas Corpus, viz. "That the Jury did acquit against the direction of the Court in matter of law." "These words (said this great Lawyer), taken literally and *de plano*, are insignificant and unintelligible, for no issue can be joined of matter of law, no Jury can be charged with the trial of matter of law barely: no evidence ever was, or can be, given to a Jury of what is law or not;

not

nor any oath given to a Jury to try matter of law alone; nor can any attain lie for such a false oath. Therefore we must take off this veil and colour of words, which make a shew of being something, but are in fact nothing: for if the meaning of these words, *Finding against the direction of the Court in matter of law*, be, that if the Judge, having heard the evidence given in Court (for he knows no other), shall tell the Jury upon this evidence, that the law is for the Plaintiff or the Defendant, and they under the pain of fine and imprisonment are to find accordingly, every one sees that the Jury is but a troublesome delay, great charge, and of no use in determining right and wrong; which were a strange and new-found conclusion, after a trial so celebrated for many hundreds of years in this country."

Lord Chief Justice Vaughan's argument is therefore plainly this: Adverting to the arguments of the Counsel, he says, You talk of the maxim *ad questionem legis non respondent juratores*; but it has no sort of application to your subject. The words of your return, viz. that Buthel did acquit against the direction of the Court in matter of law, is unintelligible, and, as applied to the case, impossible. The Jury could not be asked in the abstract, what was the law: they could not have an issue of the law joined before them: they could not be sworn to try it *ad questionem legis non respondent juratores*: therefore to say literally and *de plano* that the Jury found the law against the Judge's direction is absurd: they could not be in a situation to find it; an un-mixed question of law could not be before them: the Judge could not give any positive directions of law upon the trial; for the law can only arise out of facts, and the Judge cannot know what the facts are till the Jury have given their verdict. Therefore, continued the Chief Justice, let us take off this veil and colour of words, which make a shew of being something, but are, in fact, nothing: let us get rid of the fallacy of applying a maxim, which truly describes the jurisdiction of the Courts over issues of law, to destroy the jurisdiction of Jurors in cases where law and fact are blended together upon a trial. For if the Jury at the trial are bound to receive the law from the Judge, every one sees that it is a mere mockery, and of no use in determining right and wrong.

This is the plain common sense of the argument; and it is impossible to suggest a distinction between its application to Buthel's case and to the present; except that the right of imprisoning the Jurors was there contended for, in order to enforce obedience to the directions of the Judge.

But this distinction, if it deserves the name, though held up by Mr. Bearcroft as very important, is a distinction without a difference. For if, according to Vaughan, the free agency of the Jury over the whole charge, uncontrouled by the Judge's direction, constitutes the whole of that ancient mode of trial; it signifies nothing by what means that free agency is destroyed: whether by the imprisonment of conscience or of body; by the operation of their virtues or of their fears; whether they decline exerting their jurisdiction from being told that the exertion of it is a contempt of religious and moral order, or a contempt of the Court punishable by imprisonment; their jurisdiction is equally taken away.

My Lord, I should be very sorry improperly to waste the time of the Court, but I cannot help repeating once again, that if in consequence of the learned Judge's directions, the Jury from a just deference to learning and authority, from a nice and modest sense of duty, felt themselves not at liberty to deliver the Defendant from the whole indictment; he has not been tried. Because though he was entitled by law to plead generally that he was not guilty; though he did in fact plead it accordingly, and went down to trial upon it, yet the Jury have not been permitted to try that issue, but have been directed to find at all events a general verdict of guilty; with a positive injunction not to investigate the guilt, or even to listen to any evidence of innocence.

My Lord, I cannot help contrasting this trial with that of Colonel Gordon's, but a few Sessions past in London. I had in my hand but this moment, an accurate note of Mr. Baron Eyre's Charge to the Jury on that occasion; I will not detain the Court by looking for it amongst my papers; because I believe I can correctly repeat the substance of it.

Earl of Mansfield. The case of the King against Cosmo Gordon.

Mr. Erskine. Yes, my Lord: Colonel Gordon was indicted for the murder of General Thomas, whom he had killed in a duel: and the question was, Whether if the Jury were satisfied of that fact, the prisoner was to be convicted of murder?

That was according to Forster as much a question of law, as libel or no libel: but Mr. Baron Eyre did not therefore feel himself at liberty to withdraw it from the jury. After stating (greatly to his honour) the hard condition of the prisoner, who was brought to a trial for life, in a case where the positive law and the prevailing manners of the times

times were so strongly in opposition to one another, that he was afraid the punishment of individuals would never be able to beat down an offence so sanctioned; he addressed the Jury nearly in these words: "Nevertheless, Gentlemen, I am bound to declare to you what the law is, as applied to this case, in all the different views in which it can be considered by you upon the evidence. *Of this law and of the facts as you shall find them, your verdict must be compounded,* and I persuade myself, that it will be such as one as to give satisfaction to your own consciences."

Now, if Mr. Baron Eyre, instead of telling the Jury that a duel, however fairly and honourably fought, was a murder by the law of England, and leaving them to find a general verdict under that direction, had said to them, that whether such a duel was murder or manslaughter, was a question with which neither he nor they had any thing to do, and on which he should therefore deliver no opinion; and had directed them to find that the prisoner was guilty of killing the deceased in a deliberate duel, telling them, that the Court would settle the rest; that would have been directly consonant to the case of the Dean of St. Asaph. By this direction, the prisoner would have been in the hands of the Court, and the Judges, not the Jury, would have decided upon the life of Colonel Gordon.

But the two learned Judges differ most essentially indeed.

Mr. Baron Eyre conceives himself bound in duty to state the law as applied to the particular facts, and to leave it to the Jury.

Mr. Justice Buller says, he is not bound nor even allowed so to state or apply it, and withdraws it entirely from their consideration.

Mr. Baron Eyre tells the Jury that their verdict is to be compounded of the fact and the law.

Mr. Justice Buller, on the contrary, that it is to be confined to the fact only, the law being the exclusive province of the Court.

My Lord, it is not for me to settle differences of opinion between the Judges of England, nor to pronounce which of them is wrong: but, since they are contradictory and inconsistent, I may hazard the assertion that they cannot both be right: the authorities which I have cited, and the general sense of mankind which settles every thing else, must determine the rest.

My Lord, I come now to a very important part of the case, untouched I believe before in any of the arguments on this occasion.

I mean to contend, that the learned Judge's Charge to the Jury cannot be supported even upon its own principles; for, supposing the Court to be of opinion that all I have said in opposition to these principles is inconclusive, and that the question of libel, and the intention of the publisher were properly withdrawn from the consideration of the Jury, still I think I can make it appear that such a judgment would only render the misdirection more palpable and striking.

I may safely assume, that the learned Judge must have meant to direct the Jury either to find a general or a special verdict; or, to speak more generally, that one of these two verdicts must be the object of every charge: for I venture to affirm, that neither the records of the Courts, the reports of their proceedings, nor the writings of lawyers, furnish any account of a third. There can be no middle verdict between both; the Jury must either try the whole issue generally, or find the facts specially, referring the legal conclusion to the Court.

I may affirm with equal certainty, that the general verdict, *ex vi termini*, is universally as comprehensive as the issue, and that consequently such a verdict on an indictment, upon the general issue, Not Guilty, universally and unavoidably involves a judgment of law, as well as fact; because the charge comprehends both, and the verdict, as has been said, is co-extensive with it. Both Coke and Littleton give this precise definition of a general verdict; for they both say, that if the Jury will find the law, they may do it by a general verdict, which is ever as large as the issue. If this be so it, follows by necessary consequence, that if the Judge means to direct the Jury to find generally against a Defendant, he must leave to their consideration every thing which goes to the constitution of such a general verdict, and is therefore bound to permit them to come to, and to direct them how to form that general conclusion from the law and the fact, which is involved in the term guilty. For it is ridiculous to say, that Guilty is a fact; it is a conclusion in law from a fact, and therefore can have no place in a special verdict, where the legal conclusion is left to the Court.

In this case the Defendant is charged, not with having published this pamphlet, but with having published a certain false, scandalous, and seditious libel, with a seditious and rebellious intention. He pleads that he is not guilty in manner and form as he is accused; which plea is admitted on all hands to be a denial of the whole charge, and consequently

quently does not merely put in issue the fact of publishing the pamphlet, but the truth of the whole interdiction, *i. e.* the publication of the libel set forth in it, with the intention charged by it.

When this issue comes down for trial, the Jury must either find the whole charge or a part of it; and admitting, for argument sake, that the Judge has a right to direct either of these two courses; he is undoubtedly bound in law to make his direction to the Jury, conformable to the one or the other. If he means to confine the Jury to the fact of publishing, considering the guilt of the Defendant to be a legal conclusion for the Court to draw from that fact, specially found on the record; he ought to direct the Jury to find that fact, without affixing the epithet of Guilty to the finding. But, if he will have a general verdict of Guilty, which involves a judgment of law as well as fact: he must leave the law to the consideration of the Jury. For when the word guilty is pronounced by them, it is so well understood to comprehend every thing charged by the indictment, that the associate or his clerk instantly records, that the Defendant is guilty in manner and form as he is accused, *i. e.* not simply that he has published the pamphlet contained in the indictment; but that he is guilty of publishing the libel with the wicked intentions charged on him by the record.

Now, if this effect of a general verdict of Guilty is reflected on for a moment, the misdirection of directing one upon the bare fact of publishing, will appear in the most glaring colours. The learned Judge says to the Jury, Whether this be a libel is not for your consideration: I can give no opinion on that subject without injustice to the prosecutor: and as to what Mr. Jones swore concerning the Defendant's motives for the publication, that is likewise not before you: for, if you are satisfied in point of fact that the Defendant published this pamphlet, you are bound to find him guilty. Why guilty, my Lord, when the consideration of guilt is withdrawn? He confines the Jury to the finding of a fact, and enjoins them to leave the legal conclusion from it to the Court; yet, instead of directing them to make that fact the subject of a special verdict, he desires them in the same breath to find a general one; to draw the conclusion without any attention to the premises; to pronounce a verdict which upon the face of the record includes a judgment upon their oaths that the paper is a libel, and that the publisher's intentions in publishing it

were wicked and seditious, although neither the one nor the other made any part of their consideration.

My Lord, such a verdict is a monster in law, without precedent in former times, or root in the constitution. If it be true, on the principle of the charge itself, that the fact of publication was all that the Jury were to find, and all that was necessary to establish the Defendant's guilt, if the thing published be a libel; why was not that fact found like all other facts upon special verdicts? Why was an epithet, which is a legal conclusion from the fact, extorted from a Jury who were restrained from forming it themselves? The verdict must be taken to be general or special: if general, it has found the whole issue without a co-extensive examination. If special, the word Guilty, which is a conclusion from facts, can have no place in it.

Either this word Guilty is operative or unessential; an epithet of substance, or of form. It is impossible to controvert that proposition; and I give the gentlemen their choice of the alternative. If they admit it to be operative and of real substance, or to speak more plainly, that the fact of publication found specially, without the epithet of Guilty, would have been an imperfect verdict inconclusive of the Defendant's guilt, and on which no judgment could have followed: then it is impossible to deny that the Defendant has suffered injustice; because such an admission confesses that a criminal conclusion from a fact has been obtained from the Jury, without permitting them to exercise that judgment which might have led them to a conclusion of innocence: and that the word Guilty has been obtained from them at the trial as a mere matter of form, although the verdict without it, stating only the fact of publication which they were directed to find, to which they thought the finding alone enlarged, and beyond which they never enlarged their enquiry, would have been an absolute verdict of acquittal.

If, on the other hand, to avoid this insuperable objection to the charge, the word Guilty is to be reduced to a mere word of form, and it is to be contended that the fact of publication found specially would have been tantamount; be it so; let the verdict be so recorded; let the word Guilty be expunged from it, and I instantly sit down; I trouble your Lordships no further; I withdraw my motion for a new trial, and will maintain, in arrest of judgment, that the Dean is not convicted. But if this is not conceded to me, and the word Guilty, though argued to be but form, and though as such obtained from the Jury, is still preserved upon the record,

record, and made use of against the Defendant as substance; it will then become us, (independently of all consideration as lawyers), to consider a little how that argument is to be made consistent with the honour of gentlemen, or that fairness of dealing which cannot but have place wherever justice is administered.

But in order to establish that the word Guilty is a word of essential substance; that the verdict would have been imperfect without it; and that therefore the Defendant suffers by its insertion; I undertake to shew your Lordship, upon every principle and authority of law, that if the fact of publication, which was all that was left to the Jury, had been found by special verdict, no judgment could have been given on it.

My Lord, I will try this by taking the fullest finding which the facts in evidence could possibly have warranted. Supposing then, for instance, that the Jury had found that the Defendant published the paper according to the tenor of the indictment; that it was written of and concerning the King and his Government; and that the innuendos were likewise as averred, K meaning the present King, and P the present Parliament of Great Britain: on such a finding, no judgment could have been given by the Court, even if the record had contained a complete charge of a libel. No principle is more unquestionable than that to warrant any judgment upon a special verdict; the Court which can presume nothing that is not visible on the record, must see sufficient matter upon the face of it, which, if taken to be true, is conclusive of the Defendant's guilt. They must be able to say, if this record be true, the Defendant cannot be innocent of the crime which it charges on him. But from the facts of such a verdict the Court could arrive at no such legitimate conclusion; for it is admitted on all hands, and indeed expressly laid down by your Lordship in the case of the King against Woodfall, that publication even of a libel is not *conclusive* evidence of guilt; for that the Defendant may give evidence of an innocent publication.

Looking therefore upon a record containing a good indictment of a libel, and a verdict finding that the Defendant published it: but without the epithet of Guilty, the Court could not pronounce that he published it with the malicious intention, which is the essence of the crime: they could not say what might have passed at the trial: for any thing that appeared to them he might have given such evidence of innocent motive, necessity, or mistake, as might have amounted to excuse or justification.

that the facts stated upon the verdict would have been fully sufficient in the absence of a legal defence to have warranted the Judge to have directed, and the Jury to have given a general verdict of Guilty, comprehending the intention which constitutes the crime: but that to warrant the Bench, which is ignorant of every thing at the trial, to presume that intention, and thereupon to pronounce judgment on the record, the Jury must not merely find full evidence of the crime, but such facts as compose its legal definition. This wise principle is supported by authorities which are perfectly familiar.

If, in action of trover, the Plaintiff proves property in himself, possession in the Defendant, and a demand and refusal of the thing charged to be converted; this evidence unanswered is full proof of a conversion; and if the Defendant could not shew to the Jury why he had refused to deliver the Plaintiff's property on a legal demand of it, the Judge would direct them to find him guilty of the conversion. But on the same facts found by special verdict, no judgment could be given by the Court: the Judges would say, If the special verdict contains the whole of the evidence given at the trial, the Jury should have found the Defendant guilty; for the conversion was fully proved: but we cannot declare these facts to amount to a conversion: for the Defendant's intention was a fact which the Jury should have found from the evidence, over which we have no jurisdiction.

So in the case put by Lord Coke, I believe, in his first Institute, 115. If a *modus* is found to have existed beyond memory till within thirty years before the trial, the Court cannot upon such facts found by special verdict pronounce against the *modus*: but any one of your Lordships would certainly tell the Jury, that upon such evidence they were warranted in finding against it.

In all cases of prescription, the universal practice of Judges is to direct Juries, by analogy to the statute of limitations, to decide against incorporeal rights, which for many years have been relinquished, but such modern relinquishments, if stated upon the record by special verdict, would in no instance warrant a judgment against any prescription. The principle of the difference is obvious and universal: the Court looking at a record can presume nothing; it has nothing to do with reasonable probabilities, but is to establish legal certainties by its judgements. Every crime is like every other complex idea, capable of a legal definition: if all the

component parts which go to its formation are put as facts upon the record, the Court can pronounce the perpetrator of them a criminal: but if any of them are wanting, it is a chasm, in fact, and cannot be supplied. Wherever intention goes to the essence of the charge, it must be found by the Jury; it must be either comprehended under the word guilty in the general verdict, or specifically found as a fact by the special verdict. This was solemnly decided by the Court in Huggins's case, in second Lord Raymond, 1581, which was a special verdict of murder from the Old Bailey.

It was an indictment against John Huggins, and James Barnes, for the murder of Edward Arne. The indictment charged, that Barnes made an assault upon Edward Arne, being in the custody of the other prisoner Huggins, and detained him for six weeks in a room newly built over the common-sewer of the prison, where he languished and died: the indictment further charged, that Barnes and Huggins well knew that the room was unwholesome and dangerous: the indictment then charged, that the prisoner Huggins, of his malice aforethought, was present, aiding, and abetting Barnes, to commit the murder aforesaid. This was the substance of the indictment.

The special verdict found that Huggins was Warden of the Fleet by Letters Patent: that the other prisoner Barnes was servant to Gibbons Huggins, deputy in the care of all the prisoners, and of the deceased, a prisoner there. That the prisoner Barnes, on the 7th of September, put the deceased Arne in a room over the common-sewer which had been newly built, knowing it to be newly built, and damp and situated as laid in the indictment: "and that fifteen days before the prisoner's death, Huggins likewise well knew that the room was newly built, damp, and situated as laid. They found that fifteen days before the death of the prisoner, Huggins was present in the room, and saw him there under duress of imprisonment, but then and there turned away, and Barnes locked the door; and that from that time till his death, the deceased remained locked up."

THE
LAWYER'S
AND
MAGISTRATE'S MAGAZINE,
For APRIL, 1791.

MR. ERSKINE'S ARGUMENT *in Support of the*
RIGHTS OF JURIES *in CASES OF LIBEL.*

IT was argued before the Twelve Judges in Serjeant's Inn, whether Huggins was guilty of murder. It was agreed that he was not answerable *criminally* for the act of his deputy, and could not be guilty, unless the criminal intention was brought personally home to himself. And it is remarkable how strongly the Judges required the fact of knowledge and malice to be stated on the face of the verdict, as opposed to *evidence* of intention, and inference from a fact.

The Court said, it is chiefly relied on that Huggins was present in the room, and saw Arne *sub duritie imprisonmenti, et se avertit*; but he might be present and not know all the circumstances; the words are *VIDIT sub duritie*; but he might *see* him under duress, and not *know* he was under duress: it was answered, that seeing him under duress evidently means he knew he was under duress; "but," says the Court, "we cannot take things by inference in this manner; his seeing is but evidence of his knowledge of these things, and therefore the Jury if the fact would have borne it, should have found that Huggins knew he was there without his consent, which not being done, we cannot intend these things nor infer them; we must judge of facts, and not

and is indeed admitted, that the *prima facie* evidence of the crime is not such a fact as amounts to conclusive guilt; since as the criminal inference from the fact have been rebutted at the trial from a special finding, that the defendant is per indicted according to the

It follows from this, that in the fact of publication, which was *without affixing the epithet of* , gally affixed by an investigator *venire facias de novo* must have uncertainty of the verdict whereas it will now be argued the dialogue to be a libel, the because the verdict does not which is a finding consistent *Guilty* of publishing, which is publication charged by the indictment

My Lord, how I shall be client against such an argument I feel all the weight of it; me to greater attention; which subjects him to it, without the weight of such an argument

verdict is, "Guilty of publishing, but whether a libel or not they do not find." And it is therefore impossible to say that they can have found a criminal motive in publishing a paper, on the criminality of which they have formed no judgment. Printing and publishing that which is legal, contains in it no crime; the guilt must arise from the publication of a libel; and there is therefore a palpable repugnancy on the face of the verdict itself, which first finds the Dean guilty of publishing, and then renders the finding a nullity, by pronouncing ignorance in the Jury whether the thing published comprehends any guilt.

To conclude this part of the subject, the epithet of guilty (as I set out with at first) must either be taken to be substance or form. If it be substance, and as such conclusive of the *criminal* intention of the publisher, should the thing published be hereafter adjudged to be a libel; I ask a new trial, because the Defendant's guilt in that respect has been found without having been tried: if, on the other hand, the word *Guilty* is admitted to be but a word of form, then let it be expunged, and I am not hurt by the verdict.

Having now established, according to my two first propositions, that the Jury upon every general issue, joined in a criminal case, have a constitutional jurisdiction over the whole charge, I am next, in support of my third, to contend, that the case of a libel forms no legal exception to the general principles which govern the trial of all other crimes, that the argument for the difference, *viz.* because the whole charge always appears on the record, is false in fact, and that even if true, it would form no substantial difference in law.

As to the first, I still maintain that the whole case does by no means necessarily appear on the record; the Crown may indict part of the publication, which may bear a criminal construction when separated from the context; and the context omitted having no place in the indictment, the Defendant can neither demur to it, nor arrest the judgment after a verdict of Guilty; because the Court is absolutely circumscribed by what appears on the record, and the record contains a legal charge of a libel.

I maintain likewise, that according to the principles adopted upon this trial, he is equally shut out from such defence before the Jury; for though he may read the explanatory context in evidence, yet he can derive no advantage from reading it, if they are tied down to find him guilty of publishing the matter which is contained in the indictment,

however its innocence may be established by a view of the whole work. The only operation, which looking at the context can have upon a Jury is, to convince them that the matter upon the record, however libellous when taken by itself, was not intended to convey the meaning which the words indicted import in language, when separated from the general scope of the writing: but upon the principle contended for, thy could not acquit the Defendant upon any such opinion, for that would be to take upon them the prohibited question of libel, which is said to be matter of law for the Court.

My learned friend Mr. Bearcroft appealed to his audience, with an air of triumph, whether any sober man could believe, that an English Jury in the case I put from Algernon Sidney would convict a Defendant of publishing the Bible, should the Crown indict a member of a verse which was blasphemous in itself if separated from the context. My Lord, if my friend had attended to me, he would have found, that in considering such supposition as an absurdity, he was only repeating my own words. I never supposed that a Jury would act so wickedly, or so absurdly, in a case where the principle contended for by my friend Mr. Bearcroft carried so palpable a face of injustice, as in the instance which I selected to expose it: and which I therefore selected to shew that there were cases in which the supporters of the doctrine were ashamed of it, and obliged to deny its operation: for it is impossible to deny, that if the Jury can look at the context in the case put by Sidney, and acquit the Defendant on the merits of the thing published; they may do it in cases which will directly operate against the principle he seems to support. This will appear from other instances, where the injustice is equal, but not equally striking.

Suppose the Crown were to select some passage from **Locke** upon Government; as for instance; "that there was no difference between the King and the Constable when either of them exceeded their authority." That assertion under certain circumstances, if taken by itself without the context, might be highly seditious, and the question therefore would be *quo animo* it was written: perhaps the real meaning of the sentence might not be discoverable by the immediate context without a view of the whole chapter, perhaps of the whole book; therefore to do justice to the Defendant, upon the very principle by which Mr. Bearcroft in answering Sidney's case can alone acquit the publisher of his Bible, the Jury must look into the whole Essay on Govern-

ment, and form a judgment of the design of the author and the meaning of his work.

Lord Mansfield. To be sure they may judge from the whole work.

Mr. Erskine. And what is this, my Lord, but determining the question of libel which is denied to-day? for if a Jury may acquit the publisher of any part of Mr. Locke on Government, from a judgment arising out of a view of the whole book, though there be no innuendos to be filled up as facts in the indictment; what is it that bound the Jury to convict the Dean of St. Asaph, as the publisher of Sir William Jones's dialogue, on the bare fact of publication, without the right of saying that his observations, as well as Mr. Locke's, were speculative, abstract, and legal?

Lord Mansfield. They certainly may in all cases go into the whole context.

Mr. Erskine. And why may they go into the context? Clearly, my Lord, to enable them to form a correct judgment of the meaning of the part indicted, even though no particular meaning be submitted to them by averments in the indictment; and therefore the very permission to look at the context for such a purpose (where there are no innuendos to be filled up by them as facts), is a palpable admission of all I am contending for, viz. the right of the Jury to judge of the merits of the paper, and the intention of its author.

But it is said, that though a Jury have a right to decide that a paper, criminal as far as it appears on the record, is nevertheless legal when explained by the whole work of which it is a part; yet that they shall have no right to say that the whole work itself, if it happens to be all indicted, is innocent and legal. This proposition, my Lord, upon the bare stating of it, seems too preposterous to be seriously entertained; yet there is no alternative between maintaining it in its full extent, and abandoning the whole argument.

If the Defendant is indicted for publishing part of the verse in the Psalms, "There is no God," it is asserted that the Jury may look at the context; and seeing that the whole verse did not maintain that blasphemous proposition, but only that the fool had said so in his heart, may acquit the Defendant upon a judgment that it is no libel, to impute such imagination to a fool: but if the whole verse had been indicted, viz. "The fool has said in his heart there is no God;" the Jury, on the principle contended for, would be restrained from the same judgment of its legality, and

and must convict of blasphemy on the fact of publishing, leaving the question of libel untouched on the record.

If, in the same manner, only part of this very dialogue had been indicted instead of the whole, it is said, even by your Lordship, that the Jury might have read the context, and then, notwithstanding the fact of publishing, might have collected from the whole its abstract and speculative nature, and have acquitted the Defendant upon that judgment of it: and yet it is contended that they have no right to form the same judgment of it upon the present occasion, although the whole be before them upon the face of the indictment; but are bound to convict the Defendant upon the fact of publishing, notwithstanding they should have come to the same judgment of its legality which it is admitted they might have come to on trying an indictment for the publication of a part. Really, my Lord, the absurdities and gross departures from reason, which must be hazarded to support this doctrine, are endless.

The criminality of the paper is said to be a question of law, yet the meaning of it, from which alone the legal interpretation can arise, is admitted to be a question of fact. If the text be so perplexed and dubious as to require inuendos to explain, to point, and to apply obscure expression or construction, the Jury alone, as judges of fact, are to interpret and to say what sentiments the author must have meant to convey by his writing: yet if the writing be so plain and intelligible as to require no averments of its meaning, it then becomes so obscure and mysterious as to be a question of law, and beyond the reach of the very same men who but a moment before were interpreters for the Judges; and though its object be most obviously peaceable, and its author innocent, they are bound to say, upon their oaths, that it is wicked and seditious, and the publisher of it guilty.

As a question of fact, the Jury are to try the real sense and construction of the words indicted, by comparing them with the context; and yet if that context itself which affords the comparison makes part of the indictment, the whole becomes a question of law; and they are then bound down to convict the Defendant on the fact of publishing it, without any jurisdiction over the meaning. To complete the juggle, the intention of the publisher may likewise be shewn as a fact, by the evidence of any extrinsic circumstances, such as the context to explain the writing, or the circumstances of mistake or ignorance in what was published; and yet in the same breath

pronounced to be an inference of law from the act of publication, which the Jury cannot exclude, but which must depend upon the future judgment of the Court.

But the danger of this system is no less obvious than its absurdity. I do not believe that its authors ever thought of inflicting death upon Englishmen without the interposition of a Jury; yet its establishment would unquestionably extend to annihilate the substance of that trial in every prosecution for high treason, where the publication of any writing was laid as the overt-act. I illustrated this by a case when I moved for a rule, and called upon my friends for an answer to it; but no notice has been taken of it by any of them: this was just what I expected: when a convincing answer cannot be found to an objection, those who understand controversy never give strength to it by a weak one.

I said, and I again repeat, that if an indictment charges that a Defendant did traitorously intend, compass, and imagine the death of the King; and, in order to carry such treason into execution, published a paper which it sets out *literatim* on the face of the record; the principle which is laid down to-day would subject that person to the pains of death by the single authority of the Judges, without leaving any thing to the Jury, but the bare fact of publishing the paper. For, if that fact were proved, and the Defendant called no witnesses, the Judge who tried him would be warranted, nay bound in duty by the principle in question, to say to the Jury, Gentlemen, the overt-act of treason charged upon the Defendant, is the publication of this paper, intending to compass the death of the King; the fact is proved, and you are therefore bound to convict him: the treasonable inattention is an inference of law from the act of publishing; and if the thing published does not upon a future examination intrinsically support that inference, the Court will arrest the judgment, and your verdict will not affect the prisoner.

My Lord, I will rest my whole argument upon the analogy between these two cases, and give up every objection to the doctrine when applied to the one, if upon the strictest examination it shall not be found to apply equally to the other.

If the seditious intention be an inference of law from the fact of publishing the paper which this indictment charges to be a libel, is not the treasonable intention equally an inference from the fact of publishing that paper, which the other indictment charges to be an overt-act of treason?

In the one case, as in the other, the writing or publication of a paper is the whole charge; and the substance of the paper so written or published makes all the difference between the two offences. If that substance be matter of law where it is a seditious libel, it must be matter of law where it is an act of treason; and if because it is law the Jury are excluded from judging it in the one instance, their judgment must suffer an equal abridgement in the other.

The consequence is obvious. If the Jury by an appeal to their consciences are to be thus limited in the free exercise of that right which was given them by the constitution, to be a protection against judicial authority where the weight and majesty of the Crown is put into the scale against an obscure individual, the freedom of the press is at an end: for how can it be said that the press is free because every thing may be published without a previous licence, if the publisher of the most meritorious work, which the united powers of genius and patriotism ever gave to the world, may be prosecuted by information of the King's Attorney-General, without the consent of the Grand Jury may be convicted by the Petty Jury, on the mere fact of publishing (who indeed, without perjurying themselves, must on this system inevitably convict him), and must then depend upon Judges who may be the supporters of the very administration whose measures are questioned by the Defendant, and must therefore either give judgment against him or against themselves.

To all this Mr. Bearcroft (on the other side) shortly answers, Are you not in the hands of the same Judges, with respect to your property and even to your life, when special verdicts are found in murder, felony, and treason? In these cases do prisoners run any hazard from the application of the law by the Judges to the facts found by the Juries? Where can you possibly be safer?

My Lord, this is an argument which I can answer without indelicacy or offence, because your lordship's mind is much too liberal to suppose that I insult the Court by general observations on the principles of our legal government: however safe we might be, or might think ourselves, the Constitution never intended to invest Judges with a discretion which cannot be tried and measured by the plain and palpable standard of law; and in all the cases put by Mr. Bearcroft, no such loose discretion is exercised as must be entertained by a judgment on a seditious libel, and therefore the cases are not parallel.

On a special verdict for murder, the life of the prisoner does not depend upon the religious, moral, or philosophical ideas of the Judges concerning the nature of homicide: no, precedents are searched for; and if he is condemned at all, he is judged exactly by the same rule as others have been judged by before him; his conduct is brought to a precise, clear, intelligible standard, and cautiously measured by it; it is the Law therefore, and not the Judge, which condemns him. It is the same in all indictments, or civil actions for slander upon individuals.

Reputation is a personal right of the subject, indeed the most valuable of any, and it is therefore secured by law, and all injuries to it clearly ascertained: whatever slander hurts a man in his trade, subjects him to danger of life, liberty, or loss of property, or tends to render him infamous, is the subject of an action, and in some instances of an indictment. But in all these cases where the *malus animus* is found by the Jury, the Judges are in like manner a safe repository of the legal consequence; because such libels may be brought to a well-known standard of strict and positive law; they leave no discretion in the Judges: the determination of what words when written or spoken of another are actionable, or the subject of an indictment, leaves no more latitude to a Court sitting in judgment on the record, than a question of title does in a special verdict in ejectment.

But I beseech your Lordship to consider by what rule the legality or illegality of this dialogue is to be decided by the Court as a question of law upon the record. Mr. Bearcroft has admitted in the most unequivocal terms (what indeed it was impossible for him to deny), that every part of it when viewed in the abstract was legal; but he says, there is a great distinction to be taken between speculation and exhortation, and that it is this latter which makes it a libel. I readily accede to the truth of this observation; but how your Lordship is to determine that difference as a question of law, is past my comprehension: for if the dialogue in its phrase and composition be general, and its libellous tendency arises from the purpose of the writer to raise discontent by a seditious application of legal doctrines; that purpose is surely a question of fact, if ever there was one, and must therefore be distinctly averred in the indictment, to give the cognizance of it as a fact to the Jury, without which no libel can possibly appear upon the record: this is well known to be the only office of the inuendo; because the Judges can presume nothing which the strictest rules of

gram-

grammar do not warrant them to collect intrinsically from the writing itself.

Circumscribed by the record, your Lordship can form no judgment of the tendency of this dialogue to excite sedition by any thing but the mere words: you must look at it as if it was an old manuscript dug out of the ruins of Herculaneum; you can collect nothing from the time when, or the circumstances under which it was published; the person by whom, and those amongst whom it was circulated; yet these may render a paper at one time, and under some circumstances, dangerously wicked and seditious, which at another time, and under different circumstances, might be innocent and highly meritorious.

If puzzled by a task so inconsistent with the real sense and spirit of judicature; your Lordships should spurn the fetters of the record, and, judging with the reason rather than the infirmities of men, should take into your consideration the state of men's minds on the subject of equal representation at this moment, and the great disposition of the present times to revolution in government: if, reading the record with these impressions, your Lordships should be led to a judgment not warranted by an abstract consideration of the record, then besides that such a judgment would be founded on facts not in evidence before the Court; and not within its jurisdiction if they were; let me further remind your Lordships, that even if those objections to the premises were removed, the conclusion would be no conclusion of law: your decision on the subject might be very sagacious as politicians, as moralists, as philosophers, or as licensers of the press; but they would have no resemblance to the judgments of an English Court of Justice, because it could have no warrant from the acts of your predecessors, nor afford any precedent to your successors.

But all these objections are perfectly removed, when the seditious tendency of a paper is considered as a question of fact: we are then relieved from the absurdity of a legal discussion separated from all the facts from which alone the law can arise; for the Jury can do what (as I observed before) your Lordships cannot do in judging by the record; they can examine by evidence all those circumstances that lead to establish the seditious tendency of the paper from which the Court is shut out: they may know themselves, or it may be proved before them, that it has excited sedition already: they may collect from witnesses that it has been widely circulated, and seditiously understood; or, if the

prosecution (as is wisest) precedes these consequences, and the reasoning must be *a priori*, surely gentlemen living in the country are much better judges than your Lordship, what has or has not a tendency to disturb the neighbourhood in which they live, and that very neighbourhood is the *forum* of criminal trial.

If they know that the subject of the paper is the topic that agitates the country around them; if they see danger in that agitation, and have reason to think that the publisher must have intended it; they say he is guilty. If, on the other hand, they consider the paper to be legal, and enlightening in principle; likely to promote a spirit of activity and liberty in times when the activity of such a spirit is essential to the public safety, and have reason to believe it to be written and published in that spirit; they say, as they ought to do, that the writer or the publisher is not guilty. Whereas your Lordship's judgment upon the language of the record must ever be in the pure abstract; operating blindly and indiscriminately upon all times, circumstances, and intentions, making no distinction between the glorious attempts of a Sidney or a Russel, struggling against the terrors of despotism under the Stuarts; and those desperate adventurers of the year forty-five, who libelled the person, and excited rebellion against the mild and gracious government of our late excellent sovereign King George the Second.

My Lord, if the independent gentlemen of England are thus better qualified to decide from cause of knowledge, it is no offence to the Court to say, that they are full as likely to decide with impartial justice as Judges appointed by the Crown. Your Lordships have but a life interest in the public property, but they have an inheritance in it for their children. Their landed property depends upon the security of the Government; and no man who wantonly attacks it, can hope or expect to escape from the selfish lenity of a Jury. On the first principles of human action they must lean heavily against him. It is only when the pride of Englishmen is piqued by such doctrines as I am opposing to-day, that they think it better to screen the guilty by an indiscriminate opposition to them, than surrender those rights by which alone innocence in the day of danger can be protected.

I venture therefore to say, in support of one of my original propositions, that where a writing, indicted as a libel, neither contains, nor is averred by the indictment to contain, any slander of an individual, so as to fall within those
rules

rules of law which protect personal reputation, but whose criminality is charged to consist (as in the present instance) in its tendency to stir up general discontent, that the trial of such an indictment neither involves, nor can in its obvious nature involve, any abstract question of law for the judgment of a Court, but must wholly depend upon the judgment of the Jury on the tendency of the writing itself to produce such consequences, when connected with all the circumstances which attended its publication.

It is unnecessary to push this part of the argument further, because I have heard nothing from the *Barr* against the position which it maintains; none of the gentlemen have, to my recollection, given the Court any one single reason, good or bad, why the *tendency* of a paper to stir up discontent against Government, separated from all the circumstances which are ever shut out from the record, ought to be considered as an abstract question of law: they have not told us where we are to find any matter in the books to enable us to argue such questions before the Court; or where your Lordships yourselves are to find a rule for your judgments on such subjects. I confess that to me it looks more like legislation, or arbitrary power, than English judicature. If the Court can say, this is a criminal writing, *not* because we know that mischief was intended by its author, or is even contained in itself, but because fools, believing the one and the other, may do mischief in their folly; the suppression of such writings under particular circumstances may be wise policy in a state; but upon what principle it can be criminal law in England to be settled in the abstract by Judges, I confess with humility that I have no organs to understand.

Mr. Leycester felt the difficulty of maintaining such a proposition by any argument of law, and therefore had recourse to an argument of fact. "If (says my learned friend) what is or is not a seditious libel be not a question of law for the Court, but of fact for the Jury, upon what principle do Defendants, found guilty of such libels by a general verdict, defeat the judgment for error on the record? and what is still more in point, upon what principle does Mr. Erskine himself, if he fails in his present motion, mean to ask your Lordships to arrest this very judgment, by saying that the dialogue is not a libel?"

My Lord, the observation is very ingenious, and God knows the argument requires that it should; but it is nothing more. The arrest of judgment which follows after a verdict of guilty for publishing a writing, while

specification of the record, exhibits to the Court no specific offence against the law, is no impeachment of my doctrine: I never denied such a jurisdiction to the Court. My position is, that no man shall be punished for the criminal breach of any law until a Jury of his equals have pronounced him guilty in mind as well as in act. *Actus non facit reum nisi mens sit rea.*

But I never asserted, that a Jury had the power to make criminal law as well as to administer it; and therefore it is clear that they cannot deliver over a man to punishment if it appears by the record of his accusation, which is the office of judicature to examine, that he has not offended against any positive law; because, however criminal he may have been in his disposition, which is a fact established by the verdict, yet statute and precedents can alone decide what is by law an *indictable* offence.

If, for instance, a man were charged by an indictment with having held a discourse in words highly seditious, and were found guilty by the Jury, it is evident that it is the province of the Court to arrest that judgment; because, though the Jury have found that he spoke the words as laid in the indictment with the seditious intention charged upon him, which they, and they only; could find; yet as the words are not punishable by indictment, as when committed to writing, the Court could not pronounce judgment: the declaration of the Jury, that the Defendant was guilty in manner and form as accused, could evidently never warrant a judgment, if the accusation itself contained no charge of an offence against the law.

In the same manner, if a butcher were indicted for privately putting a sheep to causeless and unnecessary torture in the exercise of his trade, but not in public view so as to be productive of evil example, and the Jury should find him guilty, I am afraid that no judgment could follow; because though done *malo animo*, yet neither statute nor precedent have perhaps determined it to be an indictable offence; it would be difficult to draw the line. An indictment would not lie for every inhuman neglect of the sufferings of the smallest innocent animals which Providence has subjected to us.

Yet the poor beetle which we tread upon,
In corporal suffering feels a pang as great.
As when a giant dies.

A thou

A thousand other instances might be brought of acts base and immoral, and prejudicial in their consequences; which are not yet indictable by law.

In the case of the King against Brewer, in Cowper's Reports, it was held, that *knowingly* exposing to sale and selling gold under sterling for standard gold is not indictable, because the Act refers to goldsmiths only, and private cheating is not a common-law offence.

Here too the declaration of the Jury, that the Defendant is guilty in manner and form, as accused, does not change the nature of the accusation; the verdict does not go beyond the charge; and, if the charge be invalid in law, the verdict must be invalid also.

All these cases therefore, and many similar ones which might be put, are clearly consistent with my principle. I do not seek to erect Jurors into Legislators or Judges: there must be a rule of action in every society which it is the duty of the Legislature to create, and of judicature to expound when created. I only support their right to determine guilt or innocence where the crime charged is blended by the general issue with the intention of the criminal; more especially when the quality of the act itself, even independent of that intention, is not measurable by any precise principle or precedent of law, but is inseparably connected with the time when, the place where, and the circumstances under which, the Defendant acted.

My Lord, in considering libels of this nature as opposed to slander on individuals to be mere questions of fact, or at all events to contain matter fit for the determination of the Jury; I am supported not only by the general practice of Courts, but even of those very practisers themselves, who in prosecuting for the Crown have maintained the contrary doctrine.

Your Lordships will, I am persuaded, admit, that the general practice of the profession, more especially of the very heads of it, prosecuting too for the public, is strong evidence of the law. Attorney-Generals have seldom entertained such a jealousy of the King's Judges in state prosecutions as to lead them to make presents of jurisdiction to Juries, which did not belong to them of right by the constitution of the country. Neither can it be supposed, that men in high office and of great experience should in every instance (though differing from each other in temper, character, and talents) uniformly fall into the same absurdity of declaiming to Juries upon topics totally irrele-

vant, when no such inconsistency is found to disfigure the professional conduct of the same men in other cases. Yet I may appeal to your Lordship's recollection, without having recourse to the State Trials, whether, upon every prosecution for a seditious libel within living memory, the Attorney-General has not uniformly stated such writings at length to the Jury, pointed out their seditious tendency which rendered them criminal, and exerted all his powers to convince them of their illegality, as the very point on which their verdict for the Crown was to be founded.

On the trial of Mr. Horne, for publishing an advertisement in favour of the widows of those American subjects who had been *murdered* by the King's Troops at Lexington, did the present Chancellor, then Attorney-General, content himself with saying, that he had proved the publication; and that the criminal quality of the paper, which raised the legal inference of guilt against the Defendant, was matter for the Court? No, my Lord, he went at great length into its dangerous and pernicious tendency, and applied himself with skill and ability to the understandings and the consciences of the Jurors. This instance is in itself decisive of his opinion: that great Magistrate could not have acted thus upon the principle contended for to-day: he never was an idle declaimer; close and masculine argument is the characteristic of his understanding.

The character and talents of the late Lord Chief Justice De Grey no less intitle me to infer his opinion from his uniform conduct.

In all such prosecutions while he was in office, he held the same language to Juries; and particularly in the case of the King against Woodfall (*to use the expressions of a celebrated writer on the occasion*), he tortured his faculties for more than two hours to convince them that Junius's Letter was a libel.

The opinions of another Crown Lawyer, who has since passed through the highest offices of the law, and filled them with the highest reputation, I am not driven to collect alone from his language as an Attorney-General; because he carried them with him to the seat of justice. Yet one case is too remarkable to be omitted.

Lord Camden, prosecuting Doctor Shebbeare, told the Jury, that he did not desire their verdict upon any other principle than their solemn conviction of the truth of the information, which charged the Defendant with a wicked design to alienate the hearts of the subjects of this country from their King upon the throne.

To complete the account: my learned friend Mr. Bearcroft (though last not least in favour), upon this very occasion, spoke above an hour to the Jury at Shrewsbury, to convince them of the libellous tendency of the dialogue, which soon afterwards the learned Judge desired them wholly to dismiss from their consideration, as matter with which they had no concern. The real fact is, that the doctrine is too absurd to be acted upon; too distorted in principle, to admit of consistency in practice; it is contraband in law, and can only be smuggled by those who introduce it: it requires great talents and great address to hide its deformity; in vulgar hands it becomes contemptible.

Having supported the Rights of Juries by the uniform practice of Crown Lawyers, let us now examine the question of authority, and see how this Court itself and its Judges have acted upon trials for libels in former times; for, according to Lord Raymond, in Franklin's case, (as cited by Mr. Justice Buller, at Shrewsbury), the principle I am supporting had, it seems, been only broached about the year 1731 by some men of party spirit, and then too for the very first time.

My Lord, such an observation, in the mouth of Lord Raymond, proves how dangerous it is to take up, as doctrine, every thing flung out at *nisi prius*; above all, upon subjects which engage the passions and interests of government. Because the most solemn and important trials with which history makes us acquainted, discussed too at the Bar of this Court, and when filled with Judges the most devoted to the Crown, give the most decisive contradiction to such an unfounded and unguarded assertion.

In the famous case of the Seven bishops, the question of libel or no libel was held unanimously, by the Court of King's Bench trying the cause at the Bar, to be matter for the consideration and determination of the Jury; and the Bishops' petition to the King, which was the subject of the information, was accordingly delivered to them when they withdrew to consider of their verdict.

Thinking this case decisive, I cited it at the trial; and the answer it received from Mr. Bearcroft was, that it had no relation to the point in dispute between us, for that the Bishops were acquitted, not upon the question of libel, but because the delivery of the petition to the King was held to be no publication.

I was not a little surprised at this state of it; but my turn of speaking was then past. Fortunately to-day it is my privilege to speak last; and I have now lying before me the

Fifth Volume of the State Trials, where the case of the Bishops is printed, and where it appears that the publication was expressly proved; that nothing turned upon it in the judgment of the Court; and that the charge turned wholly upon the question of libel, which was expressly left to the Jury by every one of the Judges. Lord Chief Justice Wright, in summing up the evidence, told them, that a question had at first arisen about the publication, it being insisted on that the delivery of the petition to the King had not been proved: that the Court was of the same opinion, and that he was just going to have directed them to find the Bishops not guilty, when in came my Lord President (such sort of witnesses were, no doubt, always at hand when wanted), who proved the delivery to his Majesty. Therefore, continued the Chief Justice, if you believe it was the same petition, it is a publication sufficient, and we must therefore come to inquire whether it be a libel.

He then gave his reasons for thinking it within the case *de libellis famosis*; and concluded, by saying to the Jury, "In short, I must give you my opinion: I do take it to be a libel; if my brothers have any thing to say to it, I suppose they will deliver their opinion." What opinion? not that the Jury had no jurisdiction to judge of the matter, but an opinion for the express purpose of enabling them to give that judgment which the law required at their hands.

Mr. Justice Holloway then followed the Chief Justice; and so pointedly was the question of libel or no libel, and not the publication, the only matter which remained in doubt, and which the Jury, with the assistance of the Court, were to decide upon, that, when the learned Judge went into the facts which had been in evidence, the Chief Justice said to him, "Look you by the way, Brother, I did not ask you to sum up the evidence, but only to deliver your opinion to the Jury, whether it be a libel or no." The Chief Justice's remark, though it proves my position, was however very unnecessary; for, but a moment before, Mr. Justice Holloway had declared he did not think it was a libel, but addressing himself to the Jury had said, "*It is left to you, Gentlemen.*"

Mr. Justice Powell, who likewise gave his opinion that it was no libel, said to the Jury, "*But the matter of it is before you, and I leave the issue of it to God and your own consciences.*" And so little was it in the idea of any one of the Court, that the Jury ought to sound their verdict solely
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upon the evidence of the publication, without attending on the criminality or innocence of the petition, that the Chief Justice himself consented, on their withdrawing from the bar, that they should carry with them all the materials for coming to a judgment as comprehensive as the charges, and indeed expressly directed, that the information, the libel, the declarations under the Great Seal, and even the Statute-Book, should be delivered to them.

The happy issue of this memorable trial, in the acquittal of the Bishops by the Jury exercising jurisdiction over the whole charge, freely admitted as legal even by King James's Judges, is admitted by two of the gentlemen to have prepared and forwarded the glorious era of the Revolution. Mr. Bower, in particular, spoke with singular enthusiasm concerning this verdict, chusing (for reasons sufficiently obvious) to ascribe it to a special miracle, wrought for the safety of the nation, rather than to the rights lodged in the Jury to save it by its laws and constitution.

My learned friend, finding his argument like nothing upon the earth, was obliged to ascend into Heaven to support it: having admitted that the Jury not only acted like just men towards the Bishops, but as patriot citizens towards their country, and not being able, without the surrender of his whole argument, to allow either their public spirit, or their private justice, to have been consonant to the laws, he is driven to make them the instruments of Divine Providence to bring good out of evil; and holds them up as men inspired by God to perjure themselves in the administration of justice, in order, by-the-by, to defeat the effects of that wretched system of judicature which he is defending to-day as the constitution of England. For, if the King's Judges could have decided the petition to be a libel, the Stuarts might yet have been on the throne.

My Lord, this is the argument of a priest, not of a lawyer; and even if faith, and not law, were to govern the question, I should be as far from subscribing to it as a religious opinion.

No man believes more firmly than I do, that God governs the whole universe by the gracious dispensations of his providence, and that all the nations of the earth rise and fall at his command: but then this wonderful system is carried on by the natural (though to us the often hidden) relation between effects and causes, which wisdom adjusted from the beginning, and which fore-knowledge, at the same time, rendered sufficient, without disturbing either the laws of nature or of civil society.

The prosperity and greatness of empires ever depended, and ever must depend, upon the use their inhabitants make of their reason in devising wise laws, and the spirit and virtue with which they watch over their just execution; and it is impious to suppose, that men, who have made no provision for their own happiness or security in their attention to their government, are to be saved by the interposition of Heaven in turning the hearts of their tyrants to protect them.

But if every case, in which Judges have left the question of libel to Juries in opposition to law, is to be considered as a miracle, England may vie with Palestine; and Lord Chief Justice Holt steps next into view as an apostle: for that great Judge, in Tutchin's case, left the question of libel to the Jury in the most unambiguous terms; after summing up the evidence of writing and publishing, he said to them as follows:

"You have now heard the evidence, and you are to consider whether Mr. Tutchin be guilty. They say they are innocent papers, and no libels; and they say nothing is a libel but what reflects upon some particular person. But this is a very strange doctrine, to say, it is not a libel reflecting on the government, endeavouring to possess the people that the government is mal-administered by corrupt persons, that are employed in such or such stations either in the navy or army.

"To say that corrupt officers are appointed to administer affairs, is certainly a reflection on the government. If people should not be called to account for possessing the people with an ill opinion of the government, no government can subsist. For it is very necessary for all governments that the people should have a good opinion of it; and nothing can be worse to any government than to endeavour to procure animosities as to the management of it; this has been always looked upon as a crime, and no government can be safe without it be punished."

Having made these observations, did the Chief Justice tell the Jury, that whether the publication in question fell within that principle, so as to be a libel on government, was a matter of law for the Court, with which they had no concern?—Quite the contrary: he considered the seditious tendency of the paper as a question for their sole determination, saying to them,

"Now you are to consider, whether these words I have read to you do not tend to begot an ill opinion of the administration of the government. To tell us, that those that

are employed know nothing of the matter, and those that do not know are not employed,—men are not adapted to offices, but offices to men, out of a particular regard to their interest, and not to their fitness for the places; this is the purport of these papers.”

In citing the words of Judges in judicature, I have a right to suppose their discourse to be pertinent and relevant; and that, when they state the Defendant's answer to the charge, and make remarks on it, they mean that the Jury should exercise a judgment under their direction: this is the practice we must certainly impute to Lord Holt, if we do him the justice to suppose that he meant to convey the sentiments which he expressed. So that, when we came to sum up this case, I do not find myself so far behind the learned gentleman, even in point of express authority; putting all reason, and the analogies of law which unite to support me, wholly out of the question.

There is Court of King's Bench against Court of King's Bench; Chief Justice Wright against Chief Justice Lee; and Lord Holt against Lord Raymond: as to living authorities, it would be invidious to class them; but it is a point on which I am satisfied myself, and on which the world will be satisfied likewise if ever it comes to be a question.

But, even if I should be mistaken in that particular, I cannot consent implicitly to receive any doctrine as the law of England, though pronounced to be such by magistrates the most respectable, if I find it to be in direct violation of the very first principles of English judicature. The great jurisdictions of the country are unalterable but by Parliament: and until they are changed by that authority they ought to remain sacred; the Judges have no power over them. What parliamentary abridgment has been made upon the rights of Juries since the trial of the Bishops, or since Tutchin's case, when they were fully recognized by this Court? None. Lord Raymond and Lord Chief Justice Lee ought therefore to have looked there to their predecessors for the law, instead of setting up a new one for their successors.

But, supposing the Court should deny the legality of all these propositions, or, admitting their legality, should reject the conclusions I have drawn from them; then I have recourse to my last proposition, in which I am supported even by all those authorities on which the learned Judge relies for the doctrines contained in his charge; to wit,

"That in all cases where the mischievous intention (which is agreed to be the essence of the crime) cannot be collected by simple inference from the fact charged, because the Defendant goes into evidence to rebut such inference, the intention becomes then a pure unmixed question of fact, for the consideration of the Jury.

I said the authorities of the King against Woodfall and Almon were with me. In the first, which is reported in 5th Burrow, your Lordship expressed yourself thus: "Where an act, in itself indifferent, becomes criminal, when done with a particular intent, there the intent must be proved and found. But where the act is itself unlawful (as in the case of a libel) the PROOF of justification or excuse lies on the Defendant; and, in failure thereof, the law implies a criminal intent." Most luminously expressed to convey this sentiment, viz. that when a man publishes a libel, and has nothing to say for himself, no explanation or exculpation, a criminal intention need not be proved: I freely admit that it need not; it is an inference of common sense, not of law. But the publication of a libel does not exclusively shew criminal intent, but is only an implication of law, in failure of the Defendant's proof. Your Lordship immediately afterwards, in the same case, explained this further: "There may be causes where the publication may be justified or excused as lawful or innocent; FOR NO FACT WHICH IS NOT CRIMINAL, though the paper BE A LIBEL, can amount to SUCH a publication of which a Defendant ought to be found guilty." But no question of that kind arose at the trial (*i. e.* on the trial of Woodfall.) Why? Your Lordship immediately explained why, "*Because the Defendant called no witnesses,*" expressly saying, that the publication of a libel is not in itself a crime, unless the intent be criminal. And that it is not merely in mitigation of punishment, but that *such* a publication does not warrant a verdict of guilty.

In the case of the King against Almon, a Magazine, containing one of Junius Letters, was sold at Almon's shop; there was a proof of that sale at the trial. Mr. Almon called no witnesses, and was found guilty. To found a motion for a new trial, an affidavit was offered from Mr. Almon, that he was not privy to the sale, nor knew his name was inserted as a publisher; and that this practice of bookellers being inserted as publishers by their correspondents without notice, was common in the trade.

Your Lordship said, "Sale of a book in a bookseller's shop, is *prima facie* evidence of publication by the master,
and

and the publication of a libel is *prima facie* evidence of criminal intent: it stands good till answered by the Defendant: it must stand till contradicted or explained, and if not contradicted, explained, or excused, becomes tantamount to conclusive, when the Defendant calls no witnesses."

Mr. Justice Aston said, "*Prima facie* evidence, not answered, is sufficient to ground a verdict upon: if the Defendant had a sufficient excuse, he might have proved it at the trial: his having neglected it where there was no surprise, is no ground for a new one." Mr. Justice Willes and Mr. Justice Ashhurst agreed upon those express principles.

These cases declare the law beyond all controversy to be, that publication, even of a libel, is no conclusive proof of guilt, but only *prima facie* evidence of it till answered; and that if the Defendant can shew that his intention was not criminal, he completely rebuts the inference arising from the publication; because though it remains true that he published, yet, according to your Lordship's express words, it is not such a publication of which a Defendant ought to be found guilty. Apply Mr. Justice Buller's summing up, to this law, and it does not require even a legal apprehension to distinguish the repugnancy.

The advertisement was proved to convince the Jury of the Dean's motive for publishing: Mr. Jones's testimony went strongly to it; and the evidence to character, though not sufficient in itself, was admissible to be thrown into the scale. But not only no part of this was left to the Jury, but the whole of it was expressly removed from their consideration, although in the cases of Woodfall and Almon, it was as expressly laid down to be within their cognizance, and a complete answer to the charge, if satisfactory to the minds of the Jurors,

In support of the learned Judge's charge, there can be therefore but the two arguments, which I stated on moving for the rule: either that the Defendant's evidence, namely, the advertisement; Mr. Jones's evidence in confirmation of its being *bona fide*; and the evidence to character, to strengthen that construction; were not sufficient proof that the Dean believed the publication meritorious, and published it in vindication of his honest intentions; or else, that even admitting it to establish that fact, it did not amount to such an exculpation as to be evidence on not guilty, so as to warrant a verdict. I still give the learned Judge the choice of the alternative.

As to the first, viz. whether it shewed honest intention in point of fact: that was a question for

learned Judge had thought it was not sufficient evidence to warrant the Jury's believing that the Dean's motives were such as he had declared them, I conceive he should have given his opinion of it as a point of evidence, and left it there. I cannot condescend to go further; it would be to argue a self-evident proposition.

As to the second, *viz.* that even if the Jury had believed from the evidence that the Dean's intention was wholly innocent, it would not have warranted them in acquitting, and therefore should not have been left to them upon not guilty; that argument can never be supported. For, if the Jury had declared, "We find that the Dean published this pamphlet whether a libel or not, we do not find; and we find further, that believing it in his conscience to be meritorious and innocent, he, *bona fide*, published it with the prefixed advertisement, as a vindication of his character from the seditious intentions, and not to excite sedition;" it is impossible to say, without ridicule, that on such a special verdict the Court could have pronounced a criminal judgment.

Then why was the consideration of that evidence, by which those facts might have been found, withdrawn from the Jury, after they brought in a verdict guilty of publishing ONLY, which in the King against Woodfall was only said not to negative the criminal intention, because the Defendant called no witnesses? Why did the learned Judge confine his inquiries to the innuendos, and finding them agreed in, direct the epithet of Guilty without asking the Jury if they believed the Defendant's evidence to rebut the criminal inference? Some of them meant to negative the criminal inference, by adding the word ONLY; and all would have done it, if they had thought themselves at liberty to enter upon that evidence. But they were told expressly that they had nothing to do with the consideration of that evidence, which, if believed, would have warranted that verdict. The conclusion is evident; if they had a right to consider it, and their consideration might have produced such a verdict, and if such a verdict would have been an acquittal, it must be a misdirection.

"But," says Mr. Bower, "if this advertisement prefixed to the publication, by which the Dean professed his innocent intention in publishing it, should have been left to the Jury as evidence of that intention, to found an acquittal on, even taking the dialogue to be a libel no man could

could ever be convicted of publishing any thing, however dangerous; for he would only have to tack an advertisement to it by way of preface, professing the excellence of its principles and the sincerity of his motives, and his defence would be complete."

My Lord, I never contend for any such position. If a man of education, like the Dean, were to publish a writing so palpably libellous, that no ignorance or misapprehension imputable to such a person could prevent his discovering the mischievous design of the author; no Jury would believe such an advertisement to be *bona fide*, and would therefore be bound in conscience to reject it, as if it had no existence: the effect of such evidence must be to convince the Jury of the Defendant's purity of mind, and must therefore depend upon the nature of the writing itself, and all the circumstances attending its publication.

If upon reading the paper, and considering the whole of the evidence, they have reason to think that the Defendant did not believe it to be illegal, and did not publish it with the seditious purpose charged by the indictment; he is not guilty upon any principle or authority of law, and would have been acquitted even in the Star-Chamber: for it was held by that Court in Lambe's case, in the eighth year of King James the First, as reported by Lord Coke, who then presided in it; that every one who should be convicted of a libel, must be the writer or contriver, or a *malicious* publisher, *knowing* it to be a libel.

This case of Lambe being of too high authority to be opposed, and too much in point to be passed over, Mr. Bower endeavours to avoid its force by giving it a new construction of his own: he says, that not knowing a writing to be a libel, in the sense of that case, means, not knowing the contents of the thing published, as by conveying papers sealed up, or having a sermon and a libel, and delivering one by mistake for the other. In such cases he says, *ignorantia facti excusat*, because the mind does not go with the act; *sed ignorantia legis non excusat*; and therefore if the party knows the contents of the paper which he publishes, his mind goes with the act of publication, though he does not find out any thing criminal, and he is bound to abide by the legal consequences.

That is to make criminality depend upon the consciousness of an act, and not upon the knowledge of its quality, which would involve lunatics and children in all the penalties of criminal law; for whatever they do is attended with

consciousness, though their understanding does not reach to the consciousness of offence.

The publication of a libel, not believing it to be one after having read it, is a much more favourable case than publishing it unread by mistake; the one, nine times in ten, is a culpable negligence, which is no excuse at all; for a man cannot throw papers about the world without reading them, and afterwards say he did not know their contents were criminal: but if a man reads a paper, and not believing it to contain any thing seditious, having collected nothing of that tendency himself, publishes it among his neighbours as an innocent and useful work, he cannot be convicted as a criminal publisher. How he is to convince the Jury that his purpose was innocent, though the thing published be a libel, must depend upon circumstances; and these circumstances he may, on the authority of all the cases antient and modern, lay before the Jury in evidence; because, if he can establish the innocence of his mind, he negatives the very gist of the indictment.

"In all crimes," says Lord Hale in his Pleas of the Crown, the intention is the principal consideration: it is the mind that makes the taking of another's goods to be felony, or a bare trespass only; it is impossible to prescribe all the circumstances evidencing a felonious intent, or the contrary; but the same must be left to the attentive consideration of Judge and Jury; wherein the best rule is *in dubiis*, rather to incline to acquittal than conviction."

In the same work he says, "By the statute of Philip and Mary, touching importation of coin, counterfeit of foreign money, it must, to make it treason, be the intent to utter and make payment of the same; and the intent in this case may be tried and found by circumstances of *fact*, by words, letters, and a thousand evidences besides the bare doing of the *fact*."

This principle is illustrated by frequent practice, where the intention is found by the Jury as a *fact* in a special verdict.

It occurred not above a year ago, at East Grinstead, on an indictment for burglary, before Mr. Justice Ashurst, where I was myself Counsel for the prisoner. It was clear upon the evidence that he had broken into the house by force in the night, but I contended, that it appeared from proof that he had broken and entered with an intent to rescue his goods, which had been seized that day by the Officers of Excise; which rescue, though a capital felony by modern statute, was but a trespass, temp. Henry VIII. and consequently not a burglary.

Mr.

Mr. Justice Ashhurst saved this point of law, which the Twelve Judges afterwards determined for the prisoner; but, in order to create the point of law, it was necessary that the prisoner's intention should be ascertained as a fact; and for this purpose, the learned Judge directed the Jury to tell him with what intention they found that the prisoner broke and entered the house; which they did, by answering, "To rescue his goods;" which verdict was recorded.

In the same manner in the case of the King against Pierce, at the Old Bailey, the intention was found by the Jury as a fact in the special verdict. The prisoner having hired a horse and afterwards sold him, was indicted for felony; but the Judges doubting whether it was more than a fraud, unless he originally hired him intending to sell him, recommended it to the Jury to find a special verdict, comprehending their judgment of his intention, from the evidence. Here the quality of the act depended on the intention, which intention it was held to be the exclusive province of the Jury to determine, before the Judges could give the act any legal denomination.

My Lord, I am ashamed to have cited so many authorities to establish the first elements of the law, but it has been my fate to find them disputed. The whole mistake arises from confounding criminal with civil cases. If a printer's servant, without his master's consent or privity, inserts a slanderous article against me in his newspaper, I ought not in justice to indict him; and, if I do, the Jury, *on such proof*, should acquit him: but it is no defence to an action; for he is responsible to me *civiliter* for the damage which I have sustained from the newspaper, which is his property. Is there any thing new in this principle? So far from it, that every student knows it is as applicable to all other cases: but people are resolved, from some fatality or other, to distort every principle of law into nonsense, when they come to apply them to printing; as if none of the rules and maxims which regulate all the transactions of society had any reference to it.

If a man, rising in his sleep, walks into a china shop, and breaks every thing about him; his being asleep is a complete answer to an indictment for a trespass, but he must answer in an action for every thing he has broken.

If the proprietor of the York coach, though asleep in his bed at that city, has a drunken servant on the box at London, and drives over my leg and breaks it, he is responsible to me in damages for the accident; but I cannot indict him

as the criminal author of my misfortune. What distinction can be more obvious and simple?

Let us only then extend these principles, which were never disputed in other criminal cases, to the crime of publishing a libel; and let us, at the same time, allow to the Jury, as our forefathers did before us, the same jurisdiction in that instance, which we agree in rejoicing to allow them in all others, and the system of English law will be wise, harmonious, and complete.

My Lord, I have now finished my argument, having answered the several objections to my five original propositions, and established them by all the principles and authorities which appear to me to apply, or to be necessary for their support. In this process I have been unavoidably led into a length not more inconvenient to the Court than to myself, and have been obliged to question several judgments which had been before questioned and confirmed.

They, however, who may be disposed to censure me for the zeal which has animated me in this cause, will at least, I hope, have the candour to give me credit for the sincerity of my intentions: it is solely not my interest to stir opposition to the decided authorities of the Court in which I practise: with a seat here within the Bar, at my time of life, and looking no farther than myself, I should have been contented with the law as I found it, and have considered *how little* might be said with decency, rather than *how much*; but feeling as I have ever done upon the subject, it was impossible I should act otherwise. It was the first command and council to my youth, always to do what my conscience told me to be my duty, and to leave the consequences to God. I shall carry with me the memory, and, I hope, the practice of this parent lesson to the grave: I have hitherto followed it, and have no reason to complain that the adherence to it has been even a temporal sacrifice; I have found it, on the contrary, the road to prosperity and wealth, and shall point it out as such to my children. It is impossible in this country to hurt an honest man; but even if it were, I should little deserve that title, if I could upon any principle have consented to tamper or temporise with a question which involves in its determination and its consequences the liberty of the press, and, in that liberty, the very existence of every part of the public freedom.

Earl Mansfield's Speech in the decision of this Case, was inserted in our Magazine, Vol. I. p. 71.

ADJUDGED CASES

In the COURT OF KING'S BENCH, HILARY
TERM, 31 GEO. III.

REX v. TOPHAM.

The Defendant, Captain Topham, had been found guilty of publishing a false, scandalous, and malicious libel against the memory, character, and reputation of George Earl Cowper, then deceased, in a newspaper called the *World*. The indictment concluded "to the great scandal of the memory, &c. of the said Earl, in contempt, &c. to the evil example, &c. and against the peace."

The case now came before the Court upon a rule to shew cause why there should not be a new trial, or why the judgment should not be arrested; and it was argued upon general principles, that indictment did not lie for libel on the dead; or that it ought to alledge that it was done with an intention to excite the relations to a breach of the peace; and that evidence that the Defendant had given bond to the Stamp-Office for the duties on this news-paper, and had gone to the Stamp-Office upon the business of it, in consequences of messages left for him at the place where the paper was published, was not sufficient proof that he was the publisher.

LORD KENYON, Ch. J.—This was an indictment for a libel, tried before my brother *Buller*, who left to the consideration of the Jury the two questions, which generally arise on these trials, namely, Whether the Defendant were or were not the publisher, and whether the innuendos were made out? and the Jury found the Defendant guilty. An application was made in the last term for a new trial, or to arrest the judgment. The grounds for the former were, that another question should have been left to the Jury, namely, Whether this paper were published in the spirit of a biographer, or with a malicious intention to defame and vilify the character of Lord Cowper? Of the first question which the Jury determined, whether the Defendant were

or were not the publisher, there can be no doubt whatever; the evidence was perfectly satisfactory. It was proved that the paper was sold at the office; that the Defendant, as proprietor of the paper, had given a bond to the Stamp-Office, pursuant to the 29 Geo. III. cap. 50 § 10, for securing the duties on the advertisements; and that he had, from time to time, applied to the Stamp-Office respecting the duties on the paper. It is impossible therefore to say that this was not strong evidence to be left to the Jury to shew that he was the publisher. Then, it was asked at the Bar, Shall every person, who is a proprietor of a paper, as a feme-covert, an infant, or a trustee, be answerable *criminally* for the acts of the agent, in inserting libellous matter in the paper? To that question it is sufficient to answer, that this is not one of those cases. This was the case of an adult. And this, unquestionably, was proper evidence to the Jury, who have drawn the only conclusion which, in the discharge of their duty to themselves and the publick, they could draw. Then it was argued that, even supposing there was sufficient evidence of publication, there was no evidence of a criminal intent in the Defendant. To this I can answer, in the words of Lord Mansfield, in *Rex v. Woodfall* (*Bur.* 2667), that “where the act is in itself unlawful (as in this case), the proof of justification or excuse lies on the Defendant; and, in failure thereof, the law implies a criminal intent.” There may indeed be cases, and so it was admitted in *Rex v. Nutt* (*Fitz.* 47), of a publication in point of law, where no criminal intention can be imputed to the party, as where a person delivers a letter, without knowing its contents, or delivers one paper instead of another. But here no evidence was offered to the Jury to disprove the publication; the case was nakedly left to them to make that inference, which necessarily arises from the publication of a paper, which at present I am supposing to reflect on the memory of the nobleman mentioned in the indictment. Therefore, we are of opinion, that the questions put to the Jury were the only questions which it was the duty of the Judge to leave to them, and that they have drawn the only inference which could fairly be drawn from that evidence; and consequently that there is no ground for a new trial.

The next question is, Whether or not the judgment ought to be arrested? and that question is supposed to have some novelty in it. The only judicial decision on this subject, which was cited at the Bar, was that in 5 Co. 125, the case *de libellis famosis*; where it is said that publications defama-

tory of dead persons are libellous; and the reason given is, because it tends to stir up others of the same family, blood, or society, to revenge, and to break the peace, by provoking them to vindicate the memory of the deceased, and to wipe off that stain which the reflections on the ancestor may cast upon them. But it is to be observed that that was not the point in judgment; for it was a libel on the living Archbishop as well as on his predecessor; and therefore the judgment for the former might well have been sustained, without going into the other point incidentally mentioned by the Court. In 1 *Hawk. P. C. c. 73*, it is said, "The chief cause, for which the law so severely punishes all offences of this nature (libels), is the direct tendency of them to a breach of the public peace, by provoking the parties injured, and their friends, and families, to acts of revenge, which it would be impossible to restrain by the severest laws, were there no redress from public justice for injuries of this kind, which of all others are most sensibly felt." Now, it is fit to compare the manner in which this indictment is drawn with others of a similar nature. This professes to be a libel, merely reflecting on the memory of the late Earl Cowper; and it does not state that it tended to excite his relations to revenge, and a breach of the peace. In other cases, particularly in those reflecting on King William, the indictments charged that they were published to slander the government, with a view to counteract the Revolution. We have seen the indictment in *Rex v. Critchley*; in which it was alledged that the Defendant, "intending to vilify and scandalize the memory of Sir C. Gaunter Nicoll, &c. and to induce a belief that the said Sir C. Gaunter Nicoll had obtained the order of knighthood of the Bath by vile and scandalous means;" thereby reflecting on the government which has the distribution of honours; "that he had acted as an enemy to his kingdom, and had voted as a member of Parliament corruptly and perniciously, contrary to his duty, &c. and maliciously to fix a mark of infamy, contempt, and dishonour, on the memory, name, and family, of the said Sir C. G. Nicoll, &c. and to stir up the hatred and evil will of the subjects of the King against the family and posterity of the said Sir C. G. Nicoll." Now, to say in general, that the conduct of a dead person can at no time be canvassed; to hold that, even after ages are passed, the conduct of bad men cannot be contrasted with the good, would be to exclude the most useful part of history. And therefore it must be allowed that such publications may be fairly and honestly. But let this be:

may, whether soon or late after the death of the party, if it be done with a malevolent purpose, to vilify the memory of the deceased, and with a view to injure his posterity, as in *Rex v. Chrichley*, then it comes within the rule stated by Hawkins; then it is done with a design to break the peace, and then it becomes illegal. But on that question the Jury ought to have had the power to deliberate; something like that which was stated in *Chrichley's* case, and in *Rex v. Horne*, (*Cowp.* 672), should have been stated. We are therefore of opinion that, as nothing of that sort is stated in the prefatory part of this indictment, as that it was published with an intent to create any ill blood, or to throw any scandal on the family and posterity of Lord Cowper, or to induce them to break the peace in vindicating the honour of the family, this judgment should be arrested.

Rule absolute to arrest the judgment.

BROWN v. HARRADEN.

One German gave to the Defendant a note of hand for £.20, payable to him, or Order, on the 2d of November; and payment being refused on that day, the Plaintiff sued out a bill of Middlesex against the Defendant as indorser, on the 4th of November.

On the 5th of November the Defendant tendered the money, and the same was refused.

The question was, Whether three days grace were allowed upon promissory notes as well as on bills of exchange? for, if they were, the tender was made in time; and it was argued that though before the statute of the 3 and 4 *Anne*, cap. 9, the law stood that no action could be brought upon a promissory note, but that the same was merely evidence of the debt, yet since that statute, these notes were placed wholly on the same footing as bills of exchange.

LORD KENYON, Ch. J.—This question is of such infinite importance in every hour's transaction in the commercial world, that (I think) we should not discharge our duty to the publick, if we were to keep this matter in suspense: and we are the more ready to deliver our opinion, as this question is upon the record; for if our judgment be
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great that on *foreign* bills of ex-
change is not allowed; I think it is as little
allowed on *inland* bills; and
the same rule is applicable to some of the
cases cited. It is not too much to
say that recently after the passing of the
act the questions were not so well un-
derstood; the Judges were not so
settled; but they have now raised a system
of the public, without departing from
the principle. But when it is stated in Lord
Mansfield's opinion that a certain time
assigned by the act for the
payment of inland bills of ex-
change, the Judges were very cautious on
this point, and have been settled for more than half
a century. It is not possible to be settled
at the same time as *foreign*
bills. It has been argued that there is a
difference between bills of exchange and promissory
notes, and that there are reasons why the acceptor of the
note is bound to pay at the time than the maker of the bill, or
the difference whatever; they both are of the
same nature; and when the acceptor of the
note is equally bound to be prepared to pay
as the maker of the bill, the ground on which
the bill is not payable is the statute of *Anne*; si-

as bills of exchange, and shall be negotiated in like manner, &c. it is enacted, &c." The struggle between the merchants and the courts of law before this statute was, whether the party could declare on these notes according to the custom of merchants; Lord Holt thought not: but this statute, which was passed at the instance of the merchants, has made them that which they were not before; and they are now, with the assistance of the statute, acted upon as if they had been within the custom of merchants. The operative part of the statute proceeds to say, that such "notes shall be assignable and indorsable over in the same manner, as inland bills of exchange; that the holders may maintain actions on them in such manner as they might upon inland bills of exchange against the makers or against the indorsees, in like manner as in cases of inland bills of exchange, &c. In short, they were wholly to assume the shape of inland bills of exchange. The case cited from *Fortescue*, indeed, is undoubtedly against our opinion: but that case was determined when the doctrine on paper currency was not so well established as it has been since, and it has been constantly contradicted by the uniform practice to this time, and by the courts of law. The case of *Tindal v. Brown*, is, in my opinion, very important: that case was argued several times in this Court, and afterwards in the Exchequer Chamber; but this question was not even raised, though it would have been decisive, if well founded; and it was taken for granted in all the different stages of that cause that the laches of the holder did not commence until the expiration of the three days grace. Therefore, on the Act of Parliament, and on the authorities, I think we are warranted in deciding that the three days grace ought to be allowed on promissory notes as well as on bills of exchange; and consequently, that the tender made by the Defendant in this case is a sufficient answer to the Plaintiff's action. In addition to these considerations we are now told that it has been the constant practice at the Bank, and at the principal bankers, to make this allowance on promissory notes. Then, if we were to make a decision in opposition to all this practice, it would be attended with the most serious consequences; for these notes are circulated not only throughout this country, but also over several other countries in Europe: many of them have been discounted, and interest taken, on the supposition that three days grace are allowed: but, if we were to determine that no such allowance ought to have been made, all those parties would be involved in the crime of usury: and again, all holders of

notes, who made no demand on the makers till the expiration of the three days, and who afterwards resorted to the indorsers, will have been guilty of laches. Therefore, I am glad to find that the latter judicial determinations, and the statute of *Anne*, which was passed for the purpose of putting promissory notes on the same footing with bills of exchange, warrant the practice which has obtained in this respect, notwithstanding the former cases seem to be against it.

ASHHURST, J.—I am glad that this case is brought before the Court in order to be solemnly determined; though I confess it is a matter of astonishment to me that this question could ever have admitted a doubt since the statute of *Anne*, which was passed in order to put promissory notes on the same footing with bills of exchange in all respects. The preamble of that Act declares, that, for certain reasons there mentioned, both ought to be put on the same footing; and the enacting part says, that actions may be brought on the one in the same manner as on the other. Now, if they were to differ in so essential a point as that now contended for by the Plaintiff, they could not be said to be put on the same footing; nor could actions be brought on promissory notes in the same manner as on bills of exchange, if actions on the former might be commenced three days sooner than on the latter. And it happens very fortunately that, in putting this construction on the statute of *Anne*, our opinion will meet the general concurrence of mankind.

BULLER, J.—The question, whether three days grace shall or shall not be allowed on promissory notes, has for many years past been *vexata questio* in Westminster Hall: but the practice among merchants and bankers has been uniform in favour of the indulgence. The doubt, which has arisen in our own time, has been principally founded on the determination of Mr. J. *Dennison* at *nisi prius*; though it appears that the Jury there said that the Judge's opinion was against the practice: and that case has always been handed down in print with a *quære*. And since I have sat upon the Bench, I have always held at *nisi prius* that the three days are allowed, whether the question has arisen on the supposed laches of the holder, or in cases of usury. The cases cited by the Defendant's counsel are extremely material; for, though they do not directly decide the question, they shew that the Courts of Westminster have thought the analogy between bills of exchange and promissory notes so strong, that the rules established with respect to one ought also to prevail as to the other. Such is the general tendency of

all the cases since Lord *Mansfield's* time. Many of the cases alluded to by the Plaintiff's counsel happened before the statute of *Anne*; they only shew the strong disposition which Lord *Holt* manifested on all occasions to discourage promissory notes. It appears from them, that Lord *Holt* and the merchants were perpetually disputing whether or not they should be put on the same footing with bills of exchange. The merchants did not contend that they might recover on notes in particular cases only, but that notes should be universally considered in the same light as bills of exchange. Upon that ground they applied to the Legislature for relief; and their conduct is very strong to shew what construction the statute of *Anne* ought to receive. The language of the preamble is express that it was the object of the Legislature to put promissory notes exactly on the same footing with inland bills of exchange; and the enacting part pursues that intention. Therefore, though it has been now attempted to make a distinction between bills of exchange and promissory notes, and to shew that the former only are beneficial to trade and commerce, yet that argument is not now open; for the Legislature have said directly the reverse, and that it is for the benefit of commerce that they should be on the same footing. The other cases, cited by the Plaintiff's counsel, shew how little the law on this subject was formerly understood: but, whenever these kind of cases have been discussed of late years, the Judges have all agreed that it is essential to the welfare of the trade and commerce of the country that some certain rules should be established to govern all cases in future. With regard to the custom of merchants: it is true that a party cannot declare on notes on the custom, but he may declare on the statute, which shews that the Act of Parliament has been considered in the courts of law as putting them on the same footing with bills of exchange.

GRÖSE, J.—On reading the words of the statute of *Anne*, I have no doubt whatever but that to this purpose notes are put on the same footing with bills of exchange. It is also of great importance to consider, that the contemporaneous usage and the modern practice agree with this construction; and therefore it would be attended with the most mischievous consequences if we were now to put a different construction on it. The late cases, *Heylin v. Adamson*, *Grant v. Vaughan*, and *Tindal v. Brown*, though not precisely in point, are strong to shew that the law is as it has been now declared to be. The Case of *May v. Cooper* is indeed strong the other way: but that case cannot be sup-

ported, the true answer to it is, that when it was determined, these commercial subjects were not so well investigated, nor consequently so well understood, as they are at this time. And it is very probable that Mr. J. *Dennison* formed his opinion in *Dexlaux v. Hood* on that of *Mey v. Cooper*: but he was misled by it. Therefore, on the general reasoning of the cases cited by the Defendant's counsel, and on the clear and evident intention of the Legislature in passing the statute of *Anne*, I am of opinion that the three days grace ought to be allowed on promissory notes as well as on bills of exchange.

Judgment for the Defendant.

The KING against the Inhabitants of EATINGTON.

Two Justices having removed Jacob Harris, the pauper, from Eatington to Hooke Norton, the order was quashed, upon appeal to the Sessions upon the following

C A S E.

The pauper, being legally settled at Hooke Norton, married the daughter of one G. Malings, who was seised in fee of a cottage in Eatington, in which he resided. Immediately upon his marriage, in 1780, the pauper and his wife went to reside with Malings in the cottage, where they resided for three months, when they were removed by an order to Hooke Norton. During the time of the pauper's residence at Hooke Norton, which was about a year and an half, an only son of G. Malings died; upon which G. Malings who was old and infirm, applied to the pauper and his wife to come and live with him at Eatington, and take care of him; and, in order to induce him so to do, agreed to convey the cottage to the pauper. Accordingly, by indentures of lease and release, dated the 21st and 29th of November, 1783, G. Malings, in consideration of £.36 therein mentioned to be paid by the pauper to Malings, granted, and conveyed, the cottage to the pauper in fee. In the release was the following proviso; viz. "Provided always, and it is hereby declared and agreed, by

the said parties to these presents, and it is their true intent and meaning, that it shall and may be lawful to and for the said G. Malings to live, inhabit, dwell in, and occupy, the said cottage or tenement, with the appurtenances, as he heretofore has done, and now does, for and during the term of his natural life; any thing herein before contained to the contrary thereof in any wise notwithstanding." No money was paid by the pauper to G. Malings at the time of the execution of the deed, as a consideration for the purchase; but the premises were then of the full value of £.30. Immediately after the deed was executed, the pauper and his wife went to reside at Eatington with G. Malings at this house, so conveyed, and resided there with him till they were removed by the present order. In 1785 a mortgage of the cottage was executed by the pauper for £.12, the whole of which he received. In May 1790, a conveyance of the cottage was executed by the pauper and G. Malings to W. Harris in fee; £.31, part of the consideration money, were received by the pauper, and the remaining £.3 were paid to G. Malings. The Court of Quarter Sessions were of opinion that there was no fraud in any part of the transaction.

LORD KENTON, Ch. J.—The material question here is; Whether by the conveyance by lease and release an immediate estate in possession was vested in the releasee? for it is admitted that, unless it conveyed an estate of present interest, the pauper did not gain a settlement by residing in Eatington. It has been contended that, the former part of the release having conveyed a fee to the pauper, the subsequent proviso is so totally repugnant to it, that it must be rejected. But an estate for life to one is not totally repugnant to, but consistent with, an estate in remainder to another. And it cannot be contended that the proviso must be rejected because it stands last in the deed, and restrains the estate before created; for in all deeds of settlement, where uses are first limited, various powers, exceptions, and different modifications of them, which are to arise as shifting uses, are afterwards introduced. Then, if it be immaterial in what part of the deed the proviso is inserted (and indeed it is so), the fair construction of the whole deed, taken together, is, that an estate for life was reserved to the father, and an estate in remainder granted to the pauper. If this question had depended on the first words in the proviso, I should have thought that they would have been satisfied by determining that only a liberty to inhabit the cottage was reserved to the father: but the word "oc-
cupy".

“occupy” carries the interest reserved still farther, and shews that the whole estate was intended to be reserved to him. And if we were to go into the subsequent transaction, it is manifest that this was the intention of the parties; for the father joined with the son-in-law in making the conveyance in 1790, which shews that the parties themselves conceived they had power to convey. If such be the construction of the conveyance, the estate in remainder was not come into possession when the order of removal was made, and consequently the pauper had not that which was necessary to confer on him a settlement, namely, a present interest. Therefore it is unnecessary to go into the other point.

ASHHURST, J.—In whatever light this case is considered the pauper had not such an interest as entitled him to gain a settlement in Easington. If this be considered as a purchase for a pecuniary consideration, it was not of the value of £.30, after deducting the father's life estate. But then it was contended, that this conveyance was made as well in consideration of blood and natural love and affection as of money; and therefore that it does not come within the stat. 9 Geo. I.; even taking that to be so, it shews what was the intention of the parties, and falls in with the construction put on the deed by my Lord, that the father only conveyed the remainder to his son-in-law, expectant on the determination of his own life estate. The word “occupy” in the proviso is extremely material to shew that the deed must have this operation; for it is a reservation of the thing itself, of the whole estate. For a licence to occupy an estate for a particular time, is a lease of the whole estate for that time. Therefore the son-in-law had no right to the possession of the cottage during his father's life, and consequently did not gain a settlement by living there.

BULLER, J.—The material question is, Whether, by the terms of the proviso, the father is to be considered as having reserved merely the liberty to live in the cottage, or an estate for life? and there is no doubt but that the latter was intended. Something more was meant than a bare licence to inhabit or live in the house, for the word “occupy” is added to them; and it does not even rest there; for these are followed by other words, “as he heretofore has done, and now does, for life.” Then how did he occupy it before? He had *the whole* before. If it had been intended that the father-in-law should reserve merely a right to live in the cottage, and that the son-in-law should also have the same right during the father's life, the former would have reserved a right to inhabit particular rooms in the house: but

he reserved *the whole* for his life. The intention therefore clearly was that the father-in-law should enjoy the estate for his life, and that the pauper should only take the remainder expectant thereon.

Order of Sessions quashed.

LEFTLEY v. MILLS.

This was an action upon an inland bill of exchange, payable 14 days after sight, which was accepted by the Defendant on the 7th of April, 1790, and, of course, became payable on the 24th following, supposing three days grace were allowed upon it. The bill was presented for payment at the Defendant's house on the 24th, and notice left that it lay at the Defendant's Bankers, Lockart's; but the bill not being paid at 8 o'clock that night, a Notary's Clerk called at the Defendant's who then tendered the amount of the bill, but refused to pay 2s. 6d. which was demanded for noting it.

Upon which this action was brought; and Lord Kenyon, before whom the cause was tried, directed the Jury that a tender of the amount of the bill at *any time* of the day it became due was sufficient; and a verdict was accordingly found for the Defendant.

Now, upon a Rule for a new Trial, the question came before the Court, Whether the 2s. 6d. the charge for noting the bill, ought to have been part of the tender; and whether the acceptor had till 12 o'clock at night to pay the bill in, or whether the bill became due on the demand of payment in the former part of the day? The Court gave Judgment as follows:

LORD KENYON, Ch. J.—The question here is, On what day and at what time the Defendant was bound to pay this bill? According to the nature of the contract, the acceptance was an undertaking to pay the bill on the last of the three days of grace. Now, unless there be something in this case to distinguish it from other contracts, it must be governed by the same rules. In the case of mortgages, bonds, and a variety of other instruments, whereby parties oblige themselves to the performance of certain duties, as to pay money within a certain time, we find the rule to be,
without

without any exception, that the party bound has till the last moment of the day to deliver himself from the obligation by paying. The first case, in point of time, is that of *Hudson v. Barton*, 1 *Roll. Rep.* 189; where Lord Coke said, that a debtor is not bound to pay till the last hour of the day; and though *Haught*, J. seemed to differ from Lord Coke that difference was applicable to another part of the case. Lord Hale also, in *Kabel v. Vaughan*, 1 *Saund.* 287, was of this opinion, and said that rent was not due till the last instant of the day. *Moor* 122, *pl.* 166; and *Salk.* 578, are to the same effect. And I find no authority to the contrary; therefore the law must be the same here as in other cases. It may be said, that there is a difference in the law as applicable to contracts and forfeitures; but it is better that there should be one general and invariable rule for all cases, and adapted to the understanding of all men. Now, if a party is to perform a certain thing on a given day, in order to prevent his incurring the guilt of a crime, as, for instance, a bankrupt to surrender, it is clear that if he surrender on the last instant of the day, it is sufficient. And it is the common practice for the Commissioners to attend till 12 o'clock at night on such occasions, if the bankrupt do not surrender before. And in the case of bills of exchange, it cannot be said, that due diligence is not used, if demand be made on the day after they become due. Therefore it seems to me that in this case the Plaintiff was endeavouring to impose terms which are not warranted. But even if there be any difference between bills of exchange and other contracts in this respect, and that, for reasons which have not been stated, the party has not the whole day to pay the former, the objections made by the Defendant's counsel are decisive. There could be no protest of an inland bill of exchange before the statute of *William*; and that statute only gives a protest upon bills payable at a certain number of days *after date*; whereas this is a bill payable 14 days *after sight*, upon which the statute does not attach. And even in cases to which that statute does apply, it says expressly that the holder may protest the bill *after the expiration of three days after the bill becomes due*; then it is that the power to protest arises; but here the Plaintiff noted the bill (which is a preliminary step to the protest) before that time. The acceptor, in this case, undoubtedly was obliged to go to the holder of the bill when it became due; and if he did not at that time tender the amount of the bill, the holder might have commenced an action against him without demanding payment; but in

this case the acceptor tendered the money within the time allowed him by the law. And if we were driven to the necessity of considering the amount of the tender under the statute, in point of fact there was a tender of 6*d.* which is the exact sum given by the statute in the case of protesting inland bills of exchange. Therefore, in every view of this case, I am of opinion that the Defendant did every thing that the law required of him, and that the Plaintiff is not entitled to recover.

ASHHURST, J.—This is so clear on the Act of Parliament that it is not necessary to add any thing to what my Lord has said.

BULLER, J.—As to the event of this rule, I most thoroughly concur in opinion with the Court. But I cannot refrain from expressing my dissent to what has fallen from my Lord, respecting the time when the payment of bills of exchange may be enforced. The rule as to the time of paying rent, or any of the other cases mentioned by my Lord, cannot, I think, apply to this case. But one of the Plaintiff's counsel has correctly stated the nature of the acceptor's undertaking, which is, to pay the bill *on demand on any part of the third day of grace*; and that rule is now so well established, that it will be extremely dangerous to depart from it. With regard to foreign bills of exchange, all the books agree that the protest must be made on the last day of grace: now that supposes a default in payment, for a protest cannot exist unless default be made. But if the party has till the last moment of the day to pay the bill, the protest cannot be made on that day. Therefore the usage on bills of exchange is established; they are payable any time on the last day of grace on demand, provided that demand be made within reasonable hours. A demand at a very early hour of the day, at two or three o'clock in the morning, would be at an unreasonable hour: but, on the other hand, to say that the demand should be postponed till midnight, would be to establish a rule attended with mischievous consequences. If this case were to be governed by any analogy to the demand of rent, payment of a bill of exchange could not be demanded till sun-set; and if so, the situation of bankers would be extremely hazardous: for they would then be obliged to send out their clerks at night with bills to a very considerable amount, all of which must be presented within a short space of time, though to houses in different parts of the town. However, this consideration need not be further pursued for the determination of this case.

case. For this rule must be discharged, in whatever view it is considered. Even if this had been a foreign bill of exchange, there would have been no pretence for the demand which the Plaintiff made. It was properly said by one of the witnesses, that the fees of the notary are for *noting and demanding*. In making a protest there are three things to be done; the noting, demanding, and drawing-up the protest. The noting is unknown in the law, as distinguished from the protest; it is merely a preliminary step to the protest, and has grown into practice within these few years. But, in this case, the Notary's Clerk made a note on the bill merely for his own convenience; only to save himself trouble, in the same manner as Bankers' Clerks frequently write on the bill, "received the contents," even before they go out of their master's office; and which words are afterwards struck out, if the bill be not paid. The next and the material part, is the making of the demand: the party, making the demand, must have authority to receive the money; and, in case that is refused, the drawing-up of the protest is mere matter of form; but if the person, on whom the demand is made, be ready to pay the amount of the bill, he does all that the law requires of him. Therefore, if this had been the case of a foreign bill of exchange, the Defendant would not have been liable to pay the fees of protesting, because he was ready to pay when the demand was made. It is material too to consider by whom the demand was made in this case; I am not satisfied that it was a proper demand, for it was only 'made by the Banker's Clerk. The demand of a foreign bill must be made by a Notary Public; to whom credit is given, because he is a public officer. However, in this case, there could be no protest at all: it is clear that, at common law, no protest was required on an inland bill of exchange; it is only made under the statute of *William*, which does not apply to this case, for the reasons already given.

Rule discharged.

REX v. the Inhabitants of ST. PETROX, in DARMOUTH.

C A S E.

John Hambling, the father of the pauper's husband John Hambling deceased, having been told by the parish-officers of Townstall, that they would give him 20s. to bind out his son an apprentice if he would find a place for him, did, in July 1768, agree with Mary Hayne, widow, who occupied a farm in Slapton, to bind his son John Hambling, deceased, then aged about eight years, an apprentice to Richard Hayne, son of Mary Hayne, who was then between the age of 14 and 15, and was then resident in his mother's house as a part of her family, and had no habitation or business of his own. When this agreement was made between Hambling the father and Mary Hayne, they also agreed that he, Hambling, should pay to Mary Hayne 20s. as a consideration for such apprenticeship; but it did not appear that Mary Hayne knew that any promise was made by the overseers of Townstall to Hambling, with respect to the advancing of any money to him for this purpose. Hambling, the father, afterwards received 20s. from the churchwardens and overseers of Townstall, 5s. of which he paid to Mary Hayne, and promised to pay her the rest at 5s. a time, but applied the remaining 15s. to his own use. It appeared by the indenture of apprenticeship, dated 21st July, 1768, that John Hambling, the son, of his own free will, and with the consent of his father, voluntarily bound himself apprentice to Richard Hayne, of Slapton, till he should attain the age of 21, to learn the art of husbandry. This indenture was signed by Hambling the father, and Hambling the son, and by Richard Hayne; and was stamped with an half-crown stamp, but had no stamp thereon for the consideration money. Some time in April, previous to the date of the indenture, J. Hambling, the father, received from the parish of Townstall five shillings as need-money, he having applied for relief. J. Hambling, the son, lived in Mary Hayne's house in Slapton till he was 20 years old.

Two Justices removed Anne Hambling, widow of the said John Hambling, the son, from St. Petrox to Slapton.
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The Sessions quashed the order, and stated the case above-mentioned; and it was now contended, in support of the Order of Sessions, that the indenture was void, because the stamp-duty had not been paid upon the consideration-money of 20s.

LORD KENYON, Ch. J.—It has been very properly admitted that this indenture of apprenticeship was not absolutely void, on account of the infancy of the parties, but only voidable, and that, unless there be some other objection, the pauper is entitled to the benefit of the apprenticeship. But it has been contended that it is void on another ground, namely, for the want of an additional stamp for the consideration-money of 20s. given with the apprentice, and that this does not come within the proviso, in the statute of 8 *Ann.*, cap. 9, § 35, 36, relative to sums given with apprentices *at the public charge of any parish*, or by or out of any public charity. But I think there is no foundation for the argument. We must consider this to be a fair binding to the son, because the Sessions have not stated that it was fraudulent. Then if it were, as it professed to be, a binding to the son, and not colourably to the mother, the statute requires no duty for the consideration money, even though the money were not raised at the charge of the parish. The A& of Parliament, taking it altogether, undoubtedly imposes the duty on money paid to the master or mistress only; for it says, “that every master, or mistress, *to or with whom, or to whose use, any sum shall be given, paid, secured, or contracted, for or in respect of any such apprentice, &c.*” Now here the master did not receive the money which was given with the apprentice, but for reasons (not here stated) his mother received it; and it is not stated that she received it *as agent for her son*. But even supposing that the master had received or contracted for the consideration-money, it was not subject to the duty imposed by the statute of *Anne*, because it was money raised at the common and *public charge of the parish* of Townstall, and as such it comes within the proviso in that A&. It was assumed, in argument, as a proposition that there can be no binding of any parish apprentice within the meaning of this proviso, unless it be a compulsory binding under the 43 of *Elizabeth*, with the concurrence of two magistrates. But that cannot be the construction of that statute; for one of the purposes of raising rates for the relief of the poor was to put out children apprentices, at the expence of the parish. That is not restrained to the case of a compulsory binding, which is under a subsequent clause. And the object of that

A^ct is as well answered by a binding with the consent of the parents as by a compulsory binding without their interference. All that is required is, that the binding should be obligatory on the children. If the parents discharge their duty to the children, then there is no necessity for the interference of the magistrates and parish officers: but if the parents neglect their duty, or are not able to procure masters, then the parish officers are bound to interpose, and they stand *in loco parentum*. Then in this case the consideration money was advanced by the parish officers; it came out of a fund excepted by the statute of *Anne*. Therefore on both the points, first, that there was no money for which any duty was payable under any circumstances, or, secondly, (if there were) that it was excepted in this case, as the money was paid at the public charge of the parish, I am of opinion, that the pauper gained a settlement in Slapton, by serving under this indenture, and consequently that the order of sessions should be quashed.

ASHHURST, J.—It is not necessary to go into the first objection, that the money was paid to the master of the apprentice, and not to his mother, because the other objection is decisive, namely, that this money was paid out of the public fund of the parish. Though the Legislature, in passing the statute of *Elizabeth*, might have chiefly provided for the case of a compulsory binding, yet it cannot be supposed that that a^ct does not extend to voluntary bindings at the public charge of the parish. This was a binding at the public expence of the parish, and therefore comes within the exception in the statute of *Anne*.

Order of Sessions quashed.

REX v. the Inhabitants of COLLINGBOURN DUCIS.

C A S E.

The pauper was born in Collingbourn Kingston, when his father and mother were residing there under a certificate from Froxfield. At the age of 19 he was hired for a year to serve T. Childs of Buckholt Farm, as a carter, which he served accordingly. Buckholt Farm is extraparochial; is not a township or vill; and has no parish officers. After the pauper had served the year at Buckholt, he returned to Collingbourn Kingston, and then, being unmarried, under age, and not having done any act to gain a settlement in his own right further than as aforesaid, he was hired to, and served, S. Andrews of that parish for a year. The Court of Sessions, being of opinion that the pauper was not emancipated, and that the certificate was not discharged so as to enable him to gain a settlement in Collingbourn Kingston by hiring and service, quashed the order of the two justices, removing him from Collingbourn Ducis to Collingbourn Kingston.

LORD KENYON, Ch. J.—It is extremely clear that, if the pauper had served a year under a yearly hiring in Collingbourn Kingston, before he went to Buckholt, he could not thereby have gained a settlement in that parish, while the certificate was in force, on account of the statute of *William*. It is equally clear, that, if Buckholt had not been an extraparochial place, his service under the hiring stated in the case would have discharged him from the protection of the certificate in Collingbourn Kingston; because then the certificate, which asserted that he was settled in Froxfield, would not have been true in fact, inasmuch as it would in that case have been superseded by a subsequent settlement. But Buckholt not being a parish, wherein a settlement could be gained, the question is, Whether by any, and what means, the certificate as to this pauper was discharged? In cases of this kind, where the decisions of this Court are to guide the judgments of the magistrates, it is of great importance that they should be consistent. Now, I am not able to distinguish this case from the principle laid down in *R. v. Wiston cum*

Twambrookes. It was there held, that a person under age, who after being absent from his father's family for a considerable time, returned to it before he was an adult, or married, and before he had acquired a settlement for himself, was not emancipated, but was intitled to the benefit of his father's settlement. So in this case the son returned before he had attained the age of 21, not having gained any settlement for himself distinct from that of his father, nor having become the head of a family, and therefore this case must be governed by that of *Wilton cum Twambrookes*. The distinction which has been attempted to be taken between some of the former cases and the present, that here the son put himself out to service, is not material; for till the age of 21, not having done either of the acts above alluded to, he continued a part of his father's family.

The KING v. JAMES HARRIS.

The Defendant was a Pilot, and was tried before Lord Kenyon upon an information for a misdemeanor, in disobeying an order of council, in not remaining to perform quarantine on board a ship he had boarded to conduct into the Port of Bristol.

By the 26 Geo. II. c. 6. s. 1. it is enacted, that all persons, going on board ships from infected places, shall obey such orders as the King's Council shall make. But the statute having directed a specific punishment on persons who had performed the voyage going ashore before the quarantine expired, this was *casus omissus*, or at least no greater punishment could now be given than that mentioned in the statute, namely, six months imprisonment.

LORD KENYON, Ch. J.—By the first section in this act of parliament, the king is authorised to make such orders in council, respecting persons going on board ships which come from infected places, as he shall be advised. Now, this indictment states, that the king in council made an order in pursuance of this act, which the defendant violated; and therefore, without adverting to the other clauses in this act of parliament which are adapted to other offences,
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the question is, Whether or not the disobedience of an order thus made by the king in council be not offence at common law? And most unquestionably it is. This question, or at least the principle of it, does not now arise for the first time. In *R. v. Robinson*, 2 Burr. 799, the defendant was indicted for disobeying an order of maintenance of his grand-children. The statute 43 Eliz. c. 2. s. 7, enacts, that fathers, grand-fathers, &c. shall maintain their children, and grand-children, in such manner as the justices shall direct; and it annexes the penalty of 20*l.* per month, to be recovered in a summary way by distress, under the eleventh section. The prosecutor in that case however thought proper to prefer an indictment against the Defendant for disobeying an order of Justices made upon him; and, after verdict, a motion was made in arrest of judgment, which was argued very ably, on the ground that, as the act of parliament had annexed a specific punishment, and prescribed a particular mode of proceeding, it was not an indictable offence. But the Court, after great deliberation, were clearly of opinion, that, though the act of parliament had given the justices power to make the order, the breach of it was indictable as a misdemeanor at common law. So here this statute gave authority to the king in council to make the order in question; and the disobeying it becomes an indictable offence at common law.

ASHHURST, J.—It is a clear and established principle, that, when a new offence is created by an act of parliament, and a penalty is annexed to it by a separate and substantive clause, it is not necessary for the prosecutor to sue for the penalty, but he may proceed on the prior clause, on the ground of its being a misdemeanor. Now, here the Defendant has been guilty of a breach of the first section of this act of parliament, which expressly gave power to the king in council to make orders relative to persons going on board ships liable to perform quarantine; for the indictment states, that the king in council made an order on this subject, which it was competent to him to make, and that the Defendant disobeyed it. For this he is clearly punishable, as for a misdemeanor at common law. This renders it unnecessary to make any determination on the fifth section of the act: but, if it were necessary to consider it, I should think that it relates only to the officers and passengers who came on board the ship from the infected place, and not to persons going on board after her arrival here.

BULLER, J.—On the first clause in this act of parliament, coupled with the order in council, there is no doubt but that the Defendant may be punished upon a common law indictment. I agree also with my brother *Asbhurst*, that the Defendant is not within the meaning of the fifth section; which is material to be considered, on account of the punishment to be inflicted on him; because, if he be liable to be sued hereafter for the 200*l.* penalty, we should not inflict the same punishment as if he were not liable to that penalty. Now, that section subjects the *captain* to a penalty of 500*l.* for quitting the ship himself, or for suffering any seaman or passenger so to do; and then the Legislature considered what punishment should be inflicted on the *seamen or passengers* quitting the ship; and enacted, by the latter part of the same section, that they should be imprisoned for six months, and should forfeit 200*l.* For it says, “if any person shall so quit such ship, &c.” namely, those persons before described, “the seamen and passengers; and it proceeds to enact that “every such person so quitting, &c. shall forfeit 200*l.*” This section therefore wholly relates to the captain, seamen, and passengers, and not to persons in the Defendant’s situation.

GROSE, J.—The act of parliament having given power to the king in council to make the order in question, and not having annexed any specific punishment to the disobedience of it, it is undoubtedly a common law offence, and must be punished accordingly.

Judgment was then pronounced, that the Defendant be imprisoned in the King’s Bench prison for one year.

*The Corporation of LYNN, v. the Corporation of LONDON
in Error.*

This was an action tried in the Court of Common Pleas upon the writ *de essendo quietum de theolonio*. The declaration stated, that, among other liberties and privileges, the citizens of London had immemorially enjoyed the privilege that all their goods should be quit and free of all toll and other customs throughout England; yet, notwithstanding the said

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LORD KENYON, Ch. J.
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dispute such a claim as the present. And though it is said that a judgment of this sort is not to be followed up by costs (upon which I am not prepared to give any opinion); yet the expences of a party's defending himself against such a claim as this would, in many instances, be more than adequate to the claim in dispute. In point of policy, therefore, it is to be wished that a party, who has done no act to enforce his claim, and who would rather abandon his right than dispute it, should not be dragged *volens* into a Court of Justice to agitate speculative questions of right. But, if such be the law, it must be submitted to, however oppressive it may be to any bodies of men or to individuals. Then we must consider whether these proceedings can be supported by the precedents which have been cited on this very writ, or by arguments drawn from analogy to other proceedings of the same nature: for it is perfectly clear that they cannot be supported from the general analogy of the law, which does not permit any person to be impleaded for claiming rights which he does not assert. Now, some precedents on this very writ have been cited; the first of which in point of time are those in the Register, which we are told is coeval with the law itself. It is not necessary to go through each of these; but the result from them all is, that they *complain of a damage* to the party, and in the subsequent proceedings on the writ uniformly state what the nature of that damage was. Fitzherbert says, in commenting on this writ, "And upon that (namely, the writ) he may have an *alias*, and a *pluries*, and an *attachment*, if need be, against those who take the toll." Then two precedents were cited at the bar, the one from Madox's *Firma Burgi*, the other from Ryl. Plag. Parl., which were urged as decisive authorities in favour of these proceedings: but a complete answer was given to those by the counsel for the Plaintiffs in error, and it was shewn that in both an actual injury was complained of, for the parties complaining were *distrained*. The same observation applies to the writ *ne injuste vexes*; and to that of *monstraverunt*, of which it is said that, *if* after the writ sued out the lord *distrain the tenant*, the latter may proceed. The last authority, which was cited by the Defendants in error, on the general question, was that in 1 *Inst.* 104. This struck me at first as worth further consideration: but now I think it will not be found to govern this case. The opinion of Lord Coke arises in his comment on the text in Littleton: who himself seems to have thought that, if the

lord would not acquit the tenant, *but suffered him to be distrained*, the latter should have a writ of *mesne* against the lord, and recover damages. The text therefore is confined to the case of an *actual damage* by distress: It is true indeed that Lord Coke commenting on the writ of *mesne*, says, that there are six writs in law, which may be maintained, *quia timet*, before any distress, or impleading. But I do not think that this passage breaks in upon the argument of the Plaintiffs in error; they do not object to the writ itself, but to the subsequent proceedings on it. Lord Coke does not say, that the tenant may *count* on that writ, unless damage be done to him. But without determining that point, it is sufficient for us, in deciding on the writ *de thelonio*, to say that, however this may resemble the writ of *monstraverunt*, it is not that writ; neither is it classed by Fitzherbert under the same head, but is treated by him as a writ totally distinct from it. It is *sui nominis* at least, if not *sui generis*. And as Lord Coke when he was enumerating all those writs in the passage alluded to, omitted this, why are we to insert it under that class? If indeed this had been a writ extremely beneficial to the subject, and if the same reasons which applied to those writs, also extended to this, we should perhaps have held that the proceedings on the one were applicable to the other. These are the grounds which influence my judgment strongly against these proceedings. In the first place, it is against the general principles of the law, that a party, who has not received any injury, should compel another to answer him in a Court of Justice. In the next place, it is also against policy; for the reasons I have mentioned. And lastly these proceedings are not warranted by the precedents with respect to this writ itself; but they are directly contrary to the form of every proceeding of this kind which is to be found from the earliest times down to the present moment. And when we are driven to the precedents mentioned by Lord Coke, it is sufficient to say, that this is not one of them: and perhaps, on a further investigation, many reasons might occur to shew that this should not be included under those. There is a very strong reason why the party may sue the *warrantia chartæ* before he is impleaded, namely, to bind the lands of the vouchee which he has at the time of suing out the writ. That is a substantial reason why that particular writ should be issued *quia timet*; but it cannot extend this case; and there appears to be no fair reason why these proceedings should be supported. The Plaintiffs ought

to be satisfied, if the law be prompt to give them redress when their rights are invaded. These points do not appear to have been much canvassed in the Court of Common Pleas; and therefore we have less reluctance in delivering it as our opinion now, without further consideration, that the judgment ought to be reversed.

ASHMURST, J.—Though several cases have been mentioned on this (second) argument, which I had no opportunity of considering before I came into Court, yet they do not shake the opinion which I before entertained. It is a general principle of law, that, in order to found an action, there must be *damnum cum injuriâ*, except in some few particular cases; and the Defendants in error have not shewn that this is one of those. In the present case it is not pretended that the parties have at present sustained any actual damage: no injury is stated in the declaration; and though damages were given at the trial they have been since remitted. This action proceeds merely on the ground that the city of London have been *threatened* to be distrained for toll; but I think that it cannot be maintained; it is sufficient that the law of this country has provided a remedy for the subjects, when they actually receive an injury. In this case the action is brought by the corporation at large, and not by the individuals; whereas the injury (if any) must have been sustained by the individuals. The Corporation cannot be injured *quâ* corporation: but in truth no injury whatever is stated to have been sustained even by the individual members of it. This case therefore falls within the general rule, that there has been no *damnum*; and we ought not to make a new exception, at least in a case like the present. The opinion of Finch is extremely strong against this proceeding. It is observable too that Lord Coke, when he was enumerating the several *anomalies*, or exceptions, to the general rule, does not mention this writ. And the precedents cited from Ryley and Madox are clearly distinguishable from the present case, for the reasons already given; they both state an actual injury.

BULLER, J.—It is admitted that no proceeding like the present has been heard of for near five centuries; and I do not see for what useful purpose the corporation of London have thought proper to have recourse to it now. I cannot suggest any reason for it, except it be done with a view of preventing a jury from exercising their judgment on the question of right on any future occasion: if any such were
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the intencion, they cannot expect that this Court will lean in favour of such a proceeding. The first ground, on which the Defendants in error have attempted to support these proceedings, are the precedents; but, without going through them minutely, it is sufficient to say that there is no authority for the present action: they are all distinguishable from the case, inasmuch as they all state an actual distress. Then it was said that this was the same as the writ of *monstraverunt*: but no authority has been cited to prove it; and Fitzherbert treats of them distinctly, under different chapters, as if they were different writs; and he says expressly that the party may declare on the latter, without saying that he may on the former. Then it was urged that in *monstraverunt* the corporation at large may declare: but how is that established? Fitzherbert in every instance (except one) states, that there must be an actual distress in order that the attachment may issue, and that it must be stated to the damage of the persons suing; and in that one passage, he says, "if any be compelled to pay toll all the corporation may bring the writ." But even this fortifies the first objection, that the toll must be taken: and though he says that the writ may be sued out by all the corporation, yet he does not say that they may *all maintain the action*; so that all the passages may be reconciled. The attachments spoken of in Fitzherbert were of two sorts; one was in the nature of a criminal proceeding, for a contempt in having disobeyed the king's writ; and that might be sued by all the corporation: the other was to bring the parties into Court to answer in an action. And it is clear that the attachment, which Fitzherbert mentions in the last passage, was the criminal attachment for the contempt; on which no further proceedings could be had. There is a precedent in Lord Hale's *Manuscripts*, which clearly shews the distinction between the different attachments. "East. 1 Ed. II. Suffex. Preceptum fuit ballivis Willielmi de Brewosa de Shoreham, quod desisterent capere theolonium ab episcopo Cicestrie & hominibus suis, juxta cartam domini regis Henrici, proavi regis nunc, per quam quieti esse debent per totum regnum; qui, post diversa brevia eis missa, tam de prohibitionem quam ad respondendum, retinuerunt quod nunquam tempore regis nunc aliquod breve eis directum fuit, et quod distinctionem captam super homines dicti episcopi sine exheredatione domini sui deliberare non possunt eo quod ipse Willielmus et antecessores sui a tempore quo, &c. hucusque sentiti

seisiti fuerunt de theolonio hominum dicti episcopi, & predecessorum suorum, non obstante carta domini regis Henrici predicti. *Et quia retorum predictum sonat in contemptum domini regis; et dicti episcopi et hominum suorum predictorum dispendium, ideo præceptum esto vicecomiti quod attachiet eos, &c.*" That therefore was clearly a criminal attachment; and an arbitrary proceeding it was; for there was a good legal return to it. Then let us see whether there be not something further, which shews that that was not an action, at least by the persons grieved. The persons grieved were the bishop of *Chichester* or his men: but no precedent can be found to shew that *all a persons tenants*, as such, can stand in judgment in a Court of Law. And if any action had been brought in that case, it must have been by the bishop or the person whose goods were actually seized. And therefore though civil proceedings may be instituted on a writ founded originally on the prohibitory writ, yet that writ, whatever it be, which brings the parties into Court, must be considered as the original writ in the cause; it must be founded on *damage* actually done and must be sued out by the party actually grieved. It is stated in the books that the attachment, sued out by the party grieved, is that writ; the foundation of the action, on that the Plaintiffs proceed; and count, according to *Fitzherbert*. Then it was contended, that the party may have this writ before distress, for which a marginal note in *Fitzherbert*, 32, was relied on: but those marginal notes do not deserve much attention; they were not made by *Fitzherbert*; and in the old editions those notes are not added. But even supposing that the writ of *monstraverunt* might have been sued out before distress, it does not follow that this writ may. The Counsel for the Defendants in error then relied on *Coke's* comment on *Littleton*; but on examination it will not be found to apply. The text in *Littleton*, on which Lord *Coke* was commenting, is this; "and if he (the lord) doth not acquit him (the tenant), *but suffereth him to be distrained, &c.* he shall have against his lord a writ of mesne, and shall recover against him his damages, &c." the text therefore is confined to a writ of mesne, and to the case of a distress. Lord *Coke* does not comment on the section at large; but he comments, in his usual manner, first on one part of it, and then on another. In the course of his note on the writ of mesne, he enumerates other writs of prevention, of which

which the writ in question is not one: then having dismissed those writs of prescription, he takes up the comment again on another part of the text, which applies only to the writ of *mesne*: this is (as it were) a new head, or chapter; and what he says respecting the judgment of acquittal, is only applicable to the writ of *mesne*.

On the last point, which was argued at the Bar, I think we are bound to give some opinion; and it cannot have escaped the attention of the Counsel for the City of London, how very material it is to their case. The printed report of this case refers to a MS. of Lord Hale, published by Hargrave, in which it is said, "*legitimus* must not be intended of every freeman of London; but first, he must be a freeman of London; secondly, he must be a freeman, and inhabitant of London; for though he be a freeman, yet if he inhabit out of London, he shall not be exempted from prisage even for the wines imported into London." The answer, which the Counsel for the Defendants in error have given to this objection, is, that this is a question of fact, which the Jury have determined: but I think it involves in it a question of law as well as of fact. The objection arises on the record; for it is contended by the Counsel for the City, that the word *citizens* includes all freemen, whether resident or not: if it do, such a custom cannot exist in point of law. 3 *Bullstr.* 1 *Thomp. Entr.* 302. 30 *Ed.* 3. fo. 16. and *Robinson v. Marshall*. C. B. lately. If such a custom could be supported, it might be attended with the most serious consequences; since it would be in the power of the City of London, which is one of the oldest corporations in the kingdom, to sell the privileges of every other corporation.

GROSE, J. — After the very elaborate discussion of this case, I might excuse myself from going through it again: but as I have conceived a strong opinion in favour of the Plaintiffs in error, I will just mention the general grounds of it. The principal question is, Whether or not sufficient appear on the count, to enable the Plaintiffs to recover a judgment? Now that count, as it has been observed already, undoubtedly states no damage, no specific injury to any person whatsoever. It is the policy of the law to give redress to those only who are grieved: and all the precedents in our books state not only that the party complaining has sustained an injury, but the manner also in which he

he has sustained it. The Plaintiffs themselves in this case, considered that that was necessary, because they alledged in their count that it was *to the damage of the Plaintiffs*; and damages were even given at the trial, though they were afterwards remitted. The arguments of the Defendants in error are drawn, first, from analogy to other cases, and next from the precedents: but not from principles of reason or policy. As to the first, I think there is a strong analogy between this writ and that of *monstraverunt*. The latter was brought by the tenants in ancient demesne, in order (amongst other things) to be quit of toll; and it only takes its name from one of the Latin words used in the writ. *Finch* indeed considered this only as a prohibitory writ; in this I differ from him; I consider it as a remedial as well as a prohibitory writ. In the first instance it is to prohibit the party to take the toll from those who claim the exemption; and on that prohibition not being attended to comes the attachment, which is the remedial part of the writ; and under it those who have suffered by the disobedience of the former writ may recover damages. Then if there be this analogy between this writ and the *monstraverunt*, it will appear from all the writers on this subject (except Lord *Coke*); that these proceedings cannot be supported. *Fitzherbert*, commenting on the *monstraverunt*, says, if the lord distrain, then the tenants may sue an attachment and recover their damages; and, in page 34, he says, “the Plaintiffs in the writ of attachment may count severally, and recover several damages; but they may count together in one count, and declare how they were severally *distrained*, &c.” But throughout the whole comment there is not a single passage, which does not consider the proceedings upon the attachment as founded upon a grievance actually sustained by the party suing. So in his comment on the writ *de theolonio*, he says, “the party may have an attachment against the bailiffs, or those that do grieve him, &c.” The general principle therefore to be collected is, that on both these writs the party grieved may count. The precedents too, which have been cited, all agree with this; they all state an actual grievance. In one, which was not alluded to at the Bar, *Lib. Intrat.* 97, it is expressly stated in the count in *monstraverunt*, that the Defendant *distrinxit*; so do those in *Ryley*, *Madox*, and 2 *Inst.* In that in *Ryley* it is observable, that there was a claim of exemption from

all tolls; and yet, as the parties afterwards insisted on an exemption from some in particular only, there was a judgment for those parts. In the one in *Modox*, there was not only a distress, but an avowry on it. So also in 2 *Inst.* a distress was stated; and a judgment given for 20 marks, and an inhibition to the Defendants not to distrain again. In addition to these cases, which were all cited on the first argument, a passage from *Co. Lit.* has been cited this day: but, after giving it the best consideration, I continue of the same opinion that I held before. Notwithstanding Lord *Coke's* opinion is always of considerable authority, yet it has been sometimes doubted in particular instances: and in this his comment is totally different from the text. *Littleton* was only speaking of a distress: and if what Lord *Coke* says relative to the judgment of acquittal were meant to apply to any other writ than that of mesne, which was the subject before him, he is certainly mistaken; it is merely an opinion of his own, not supported by any authority, and it is contradicted by those of *Finch* and *Fitzherbert*, and by all the precedents in the law books. On the whole, therefore, I am of opinion, that the Plaintiffs have not alledged any real injury in their count, and consequently cannot recover a judgment. I think it is not necessary to give any opinion on the last point made at the Bar, because this is sufficient to reverse the judgment in the Common Pleas. At the same time I must make one observation respecting the claim stated in the declaration. I believe it has been decided that the word "citizens" *ex vi termini*, means "resident citizens:" however, I do not wish to give any decided opinion on this point.

Judgment reversed.

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